SUPREME COURT OF THE UNITED STATES.

No. 367.

EMIL GRISAR, PLAINTIFF IN ERROR,

vs.

IRWIN McDOWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	2	1
Complaint	5	2
Summons	14	4
Answer	18	5
Stipulation	22	6
Findings	25	7
Judgment	28	8
Decree	51	13
Petition to the board of land commissioners	55	14
Order	73	19
Findings	76	20
Maps	77	20
Opinion	78	20
Clerk's certificate	97	24

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Emil Grisar, as plaintiff, and Irwin McDowell, as defendant, a manifest error hath happened, and is alleged to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, the sixth day of April, A. D. 1866, and of the independence of the United States the ninety-first.

Witness my hand and the seal of the said circuit court, this 16th day of October, A. D. 1866.

[SEAL.] GEO. C. GORHAM, *Clerk.*

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Circuit Judge.

2 UNITED STATES OF AMERICA,
Circuit Court, District of California, ss:

I, Geo. C. Gorman, clerk of the circuit court United States, district of California, do hereby certify that the return to the within writ of error appears by the schedule annexed to said writ of error.

Witness my hand and seal of said court, this 26th day of October, A. D. 1866.

[L. S.] GEO. C. GORHAM, *Clk.*
By SAMUEL NEALL, *D. C.*

Citation.

3 UNITED STATES OF AMERICA, *ss:*

To Irwin McDowell, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be held at Washington city on the 1st Monday of December, A. D. 1866, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein Emil Grisar is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of October, A. D. 1866, and of the independence of the United States the ninety-first.

STEPHEN J. FIELD,
Circuit Judge.

To DELOS LAKE, esq.,
Att'y for Irwin McDowell, Def. in Error.

4 Due and personal service of the within citation on us this day is admitted.

S. Francisco, Oct. 16, 1866.

DELOS LAKE,
Att'y for Def't.

5 In the circuit court of the United States in and for the northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

Emil Grisar, plaintiff in this suit, by Benjamin S. Brooks, his attorney, complains of Irwin McDowell, defendant, and for cause of complaint shows—

That heretofore, to wit, on the fifteenth day of June, A. D. 1865, he was seized in fee and possessed and entitled to the possession of a certain lot, piece, or parcel of land situate, lying, and being
6 in the city and county aforesaid, bounded and described as follows: Commencing at the northeast corner of Franklin and North Point streets; thence northerly along the easterly side of Franklin street to the southerly line of Beach street; thence easterly along said southerly line of Beach street to the westerly line of Van Ness avenue; thence southerly along the westerly line of Van Ness avenue to the northerly line of North Point street, and thence westerly along said northerly line of North Point street to the place of beginning, being known on the official map of said city and county as western addition block number one hundred and four, (104.)

Also all that certain piece or parcel of land situated in said
7 city and county, and bounded and described as follows: Commencing at the northeasterly corner of Beach and Franklin streets, running thence northerly along the easterly side of Franklin street, one hundred and thirty-seven and one-half feet; thence at

right angles and on a line parallel with the northerly line of Beach street, four hundred and twelve and a half (412½) feet, to the westerly line of Van Ness avenue; thence at right angles southerly along said westerly line of Van Ness avenue, one hundred and thirty seven and a half (137½) feet, to the northerly line of Franklin street; and thence westerly along said northerly line of Franklin street, four hundred and twelve and one-half (412½) feet, to the place of be-
8 ginning, being the southerly half of the lot known and described on the official map of said city and county as western addition block number one hundred and five, (105,) and so much of Franklin street as lies between said described parcels, and being so possessed thereof possessed, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, with force and arms, &c., entered into the said tenements with the appurtenances and ejected, expelled, put out, and amoved the said plaintiff from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long space of time, to wit, from the day and year aforesaid hitherto, and still keeps
9 the said plaintiff so expelled, put out, and amoved, and with force and arms entered into and took possession of the said premises, and from thenceforth hitherto hath with force and arms kept and retained the possession thereof, and still is in the possession thereof, and with force and arms detains the same from the plaintiff and deforces him thereof; and during that time the said defendant took and had and received, to the use of him, the said defendant, all the issues and profits of the said tenements, being of great monthly value, to wit, of the monthly value of one hundred dollars, whereby the said plaintiff, during all the time afore-
10 said, not only lost the issues and profits of the said tenements with the appurtenances, but was deprived of the use and means of cultivating the same, to the damage of the plaintiff of seven hundred dollars.

And also for that the said defendant heretofore, to wit, on the day and at the place aforesaid, with force and arms, &c., break into and entered certain messuage and premises of the said plaintiff, being the same in the first count of this complaint described, situate in the city and county aforesaid, and ejected, expelled, put out, and amoved the said plaintiff from his possession and occupation thereof, and kept and continued him as expelled and amoved for a long
11 space of time, to wit, from the day and year last aforesaid hitherto; and still keeps the said plaintiff so expelled, put out, and amoved, and during that time the said defendant took and had and received to the use of him, the said defendant, all the issues and profits of the said tenements, being of great monthly value, to wit, of the monthly value of one hundred dollars, whereby the said plaintiff, during all the time aforesaid, not only lost the issues and profits of the said tenements, with the appurtenances, but was deprived of the use and means of cultivating the same, to the damage of the plaintiff by the withholding of the possession as aforesaid of two thousand dollars.

12 Wherefore the plaintiff brings his suit, and prays that he may have and recover from the said defendant the said real estate and the possession thereof, and his damages aforesaid for the withholding thereof to two thousand dollars, and his costs.

B. S. BROOKS, *Pl'ffs Att'y.*

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

The above-named plaintiff, being duly sworn, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the mat-
13 ters therein stated on his information and belief, and as to those matters he believes it to be true.

EMIL GRISAR.

Sworn to before me, this 9th day of January, A. D. 1866.

GEO. C. GORHAM, *Cl'k.*
By SAM'L NEALL, *D. C.*

Indorsed: Filed January 9, 1866.

GEO. C. GORHAM, *Cl'k.*
By S. NEALL, *D. C.*

14 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the northern district of California.

EMIL GRISAR, plaintiff,
vs.
IRWIN MCDOWELL, defendant.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting, to Irwin McDowell:

15 You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons, exclusive of Sundays and day of service,) after the service on you of this summons—if served in this county; or if served out of this county, then within forty days—or judgment by default will be taken against you.

The said action is brought to recover the possession of a certain piece of land, being the city and county of San Francisco,
16 State of California, and known on the official map of said city and county as western addition block one hundred and four and block one hundred and five, and described in full in the complaint accompanying the summons herewith, besides damages in the sum of

two thousand dollars and costs of suit; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this nineteenth
17 day of March, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the 90th.

[SEAL.] GEO. C. GORHAM, *Clerk.*
By S. NEALL, *D. C.*

50ct. U. S. rev. stamp, cancelled.

U. S. MARSHAL'S OFFICE, NORTHERN DISTRICT, CALIFORNIA.

I hereby certify that I received the within summons on the 21st day of March, A. D. 1866, and personally served the same on the same day, by delivering to Irwin McDowell, said defendant, personally, in the city of San Francisco, a copy of said summons attached to a certified copy of the complaint.

CH'S W. RAND, *U. S. Marshal.*
By G. F. WORTH, *Dep.*

San Francisco, March 21, 1866.

Indorsed: Filed March 22, 1866.

GEO. C. GORHAM, *Clk.*
By S. NEALL, *D. C.*

18 *Answer.*

In the circuit court of the United States, tenth circuit, northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

And now comes the above-named defendant, Irwin McDowell, by his attorney, Delos Lake, and in answer to plaintiff's complaint herein, denies generally and specifically each and every allegation in said complaint contained.

And for a further and separate answer in this behalf, as to entering the premises described in plaintiff's complaint, and ousting, ejecting, and amoving plaintiff therefrom, as in said complaint alleged, the said defendant says that the said plaintiff ought
19 not to have or maintain his aforesaid action thereof against him, because he says that the said premises in said complaint mentioned, now are, and at the time stated in said complaint, were, the soil and freehold of the United States of America, and this defendant then was, and for a long time theretofore has been, and now is, an officer, to wit, a major general in the army of the said United States, in command of the department of California, within which

said department the lands mentioned in plaintiff's complaint are situate, and as such officer, acting under the authority of the said United States and the laws thereof, the said defendant entered upon
20 and now holds the said premises mentioned in plaintiff's com-
21 plaint for the said United States.

And the said defendant, further answering, denies that the said plaintiff has been injured or that he has sustained damage in the sum of two thousand dollars, or in any other sum whatever.

Wherefore defendant asks to be hence dismissed with his costs in this behalf sustained.

DELOS LAKE,
Att'y for Def't.

April 6, 1866.

Service made on plaintiff's att'y, by leaving a copy of within answer at his office at 4 o'cl'k, April 6, 1866.

T. M. JEWETT.

Indorsed: Filed April 6, 1866.

GEO. C. GORHAM, *Cl'k.*
By S. NEALL, *D. C.*

22 *Stipulation.*

Circuit court of the United States for the northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

It is stipulated and agreed by and between the parties to this suit, by their respective attorneys, that a jury and the right to a trial by jury, be, and the same hereby is, waived, and that the same be tried by the court.

San Francisco, June 11, 1866.

B. S. BROOKS,
Atty's for Pl'ff.
DELOS LAKE,
Att'y for Def't.

Indorsed: Filed July 11, 1860.

23 *Order.*

At a regular term of the circuit court of the United States of America, for the northern district of California, held at the court-house, in the city of San Francisco, on Saturday, the 16th of June, in the year of our Lord one thousand eight hundred and sixty-six.

Present: The honorable Stephen J. Field, judge of said court.

EMIL GRISAR
vs.
I. MCDOWELL.

And now at this day come the said parties as before, and argu-

ment of counsel having been concluded, the cause was submitted to the consideration of the court.

24 Indorsed: Filed this 16th day of June, 1866.
GEO. C. GORHAM, *Clerk.*

25 *Findings.*

Circuit court of the United States, tenth circuit, northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

This cause having heretofore, to wit, on the fifteenth day of June, A. D. eighteen hundred and sixty-six, come on for trial by the court without the intervention of a jury, by the stipulation, in writing, of the attorneys of the respective parties filed with the clerk, B. S. Brooks, esq., appeared as counsel for the plaintiff, and Delos Lake, esq., and S. M. Wilson, esq., appeared as counsel for the defendant; and the evidence for the respective parties was produced and
26 the cause thereupon argued and submitted and taken under advisement, and now the evidence having been duly considered, and the arguments of counsel thereon, the court finds the following facts:

First. That at the time of the commencement of this action, the defendant was an officer in the army of the United States, in command of the department of California, and as such officer was, and ever since has been, in the possession of the lands described in the complaint, occupying the same as a military reservation, under orders of the Secretary of War and the President of the United States.

27 Second. That at the time of the commencement of this action the plaintiff was not the owner, and had no title or right of possession in or to the lands described in the complaint, or any part thereof, [redacted] were and are in the United States.

And as a conclusion of law from the above facts the court finds that the plaintiff is not entitled to take anything by his action, but that the defendant is entitled to judgment in his favor against the said plaintiff, and for his costs in this behalf expended. Judgment will accordingly be entered for the defendant with costs.

July 17, A. D. 1866.

FIELD, *J.*

Indorsed: Filed July 20, 1866.

GEO. C. GORHAM, *Clerk.*

said department the lands mentioned in plaintiff's complaint are situate, and as such officer, acting under the authority of the said United States and the laws thereof, the said defendant entered upon and now holds the said premises mentioned in plaintiff's complaint for the said United States.

And the said defendant, further answering, denies that the said plaintiff has been injured or that he has sustained damage in the sum of two thousand dollars, or in any other sum whatever.

Wherefore defendant asks to be hence dismissed with his costs in this behalf sustained.

DELOS LAKE,
Att'y for Def't.

April 6, 1866.

Service made on plaintiff's att'y, by leaving a copy of within answer at his office at 4 o'cl'k, April 6, 1866.

T. M. JEWETT.

Indorsed: Filed April 6, 1866.

GEO. C. GORHAM, *Cl'k.*
By S. NEALL, *D. C.*

Stipulation.

Circuit court of the United States for the northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

It is stipulated and agreed by and between the parties to this suit, by their respective attorneys, that a jury and the right to a trial by jury, be, and the same hereby is, waived, and that the same be tried by the court.

San Francisco, June 11, 1866.

B. S. BROOKS,
Atty's for Pl'ff.
DELOS LAKE,
Att'y for Def't.

Indorsed: Filed July 11, 1860.

Order.

At a regular term of the circuit court of the United States of America, for the northern district of California, held at the court-house, in the city of San Francisco, on Saturday, the 16th of June, in the year of our Lord one thousand eight hundred and sixty-six.

Present: The honorable Stephen J. Field, judge of said court.

EMIL GRISAR
vs.
I. MCDOWELL.

And now at this day come the said parties as before, and argu-

ment of counsel having been concluded, the cause was submitted to the consideration of the court.

24 Indorsed: Filed this 16th day of June, 1866.
GEO. C. GORHAM, *Clerk.*

25 *Findings.*

Circuit court of the United States, tenth circuit, northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

This cause having heretofore, to wit, on the fifteenth day of June, A. D. eighteen hundred and sixty-six, come on for trial by the court without the intervention of a jury, by the stipulation, in writing, of the attorneys of the respective parties filed with the clerk, B. S. Brooks, esq., appeared as counsel for the plaintiff, and Delos Lake, esq., and S. M. Wilson, esq., appeared as counsel for the defendant; and the evidence for the respective parties was produced and
26 the cause thereupon argued and submitted and taken under advisement, and now the evidence having been duly considered, and the arguments of counsel thereon, the court finds the following facts:

First. That at the time of the commencement of this action, the defendant was an officer in the army of the United States, in command of the department of California, and as such officer was, and ever since has been, in the possession of the lands described in the complaint, occupying the same as a military reservation, under orders of the Secretary of War and the President of the United States.

27 Second. That at the time of the commencement of this action the plaintiff was not the owner, and had no title or right of possession in or to the lands described in the complaint, or any part thereof, [redacted] were and are in the United States.

And as a conclusion of law from the above facts the court finds that the plaintiff is not entitled to take anything by his action, but that the defendant is entitled to judgment in his favor against the said plaintiff, and for his costs in this behalf expended. Judgment will accordingly be entered for the defendant with costs.

July 17, A. D. 1866.

FIELD, *J.*

Indorsed: Filed July 20, 1866.
GEO. C. GORHAM, *Clerk.*

28 *Judgment.*

Circuit court of the United States, northern district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

This cause having heretofore, to wit, on the fifteenth day of June, A. D. one thousand eight hundred and sixty-six, come on for trial by the court, without the intervention of a jury, by the stipulation in writing of the attorneys of the respective parties, filed with the clerk, B. S. Brooks, esq., appearing as counsel for the plaintiff, and Delos Lake, esq., and S. M. Wilson, esq., appearing as counsel for
29 defendant; and the evidence of respective parties having been produced, and argument of counsel having been heard; and the court, after duly considering the same, having filed its findings of fact and conclusions of law, and directed that judgment be entered in favor of the defendant in accordance with said findings.

Now, therefore, it is ordered and adjudged that the said plaintiff take nothing by reason of his said action; that the said defendant go hence without day, and that he have and recover of and from the said plaintiff his costs in this behalf expended, taxed at .

Entered San Francisco, July 30, 1866.

30

31 *Bill of exceptions.*

The United States circuit court, northern district of California.

EMIL GRISAR
s.
IRWIN MCDOWELL.

This cause came on to be tried before the court sitting without a jury, a jury having been expressly waived by both parties, by stipulation in writing filed with the clerk of the court, B. S. Brooks, esq., appearing for plaintiff, and Delos Lake, esq., U. S. district attorney, and S. M. Wilson, esq., appearing for defendant.

This plaintiff proved that he was in the actual occupation of
32 the premises at the date of the alleged entry, and that the defendant on that day entered and ousted him. It was further proved that the premises in question are within the limits of the four leagues claimed by the city of San Francisco, as the successor to the pueblo of San Francisco, and confirmed to the city and county of San Francisco by a decree rendered in this court in the case of the United States *vs.* the city of San Francisco; that at the date of the introduction into the common council of the city of San Francisco of the ordinance of the common council of the city of San Francisco, passed on the 20th day of June, A. D. one thousand eight hundred and fifty-five, en-
33 titled "An ordinance for the settlement and quieting of the land titles in the city of San Francisco," the grantor of the plaintiff was in the actual possession of the said premises within the

meaning of the said ordinance, and the said ordinance, together with the act of the legislature of the State of California, passed March 11th, 1858, confirming the same, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of the said city," were put in evidence, and are made a part hereof, and may be read from the printed volume of the statute of that year; and it was further admitted that said land was within the corporate limits of the city of San Francisco, as de-
34 scribed in the act to incorporate said city, passed April 15, 1851.

The plaintiff then rested the case.

The defendant's attorneys then, on behalf of the defendant, offered in evidence an order of the President of the United States, dated Nov. 6, 1850, which is as follows:

WAR DEPARTMENT,
Washington, Nov. 7, 1850.

SIR: I am directed by the Secretary of War to enclose to you the written communication from the President of the United States, exempting from sale and reserving for public purposes certain pieces and tracts of land in the State of California.

With great respect, your obedient servant,
35 (Signed) GEO. T. M. DAVIS, *Chief Clerk.*

Hon. JUSTIN BUTTERFIELD,
Commis. Gen. Land Office.

GENERAL LAND OFFICE, *June* 24, 1851.

SIR: I have to inform you that the President of the United States exempts and reserves from sale for public purposes the following tracts or parcels of land in the State of California:

In the Bay of San Francisco, Cal.

1st. From a point 800 yards south of Point Jose to the southern boundary of the Presidio, along the southern boundary to its western extremity, and thence in a straight line to the Pacific ocean,
36 passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos.

2d. From the southern boundary of San Salito bay a line parallel to the channel of entrance to the Pacific.

3. Yerba Buena island.

4. Alcatrazes island.

5. Angel island, on the eastern side of the Bay of San Pueblo.

6th. Mare island.

7th. The land on the eastern side Mare Island straits, beginning at the high hills between the straits and the city of Benecia,
37 about 2,000 to 2,500 yards from the former, and extending, in a line nearly parallel to it, to a point opposite the northern extremity of Mare island, and thence to the straits, so as to join them

at a point about 800 yards north of the northernmost high hills on the eastern side of the straits.

(Signed) MILLARD FILLMORE.

Washington, Nov. 6, 1850.

I am, very respectfully, your obd't serv't,

J. BUTTERFIELD,
Commissioner.

SAM'L D. KING, Esq., *Surveyor General, San Jose, Cal.*

Counsel for the plaintiff objected to the admissibility of this order, on account of the indefiniteness of description, and because it
38 did not include the land in controversy, and because the President could not make reservations of public lands.

The defendant's counsel stated that the objection went to the effect of the document, and not to its admissibility, and stated that they should claim nothing under that order except as it is connected with the subsequent order.

The court overruled the objection and admitted the evidence, to which ruling the counsel for the plaintiff excepted, and his exception was duly noted.

The defendant's counsel then offered in evidence certain other documents, whose genuineness were admitted, which are in the words and figures following:

[Copy.]

39 ENGINEER DEPARTMENT,
Washington, 28 Oct., 1851.

Hon. C. M. CONRAD, *Secretary of War:*

SIR: The surveyor general of California having applied, through the Commissioner of the General Land Office, for some additional instructions to enable him to run the lines of the lands proposed as government reservations by the joint board of navy and engineer officers lately on that coast, his application, therefore, has been referred to this department.

It thus appears that some of these reservations have not yet been surveyed, and on referring the subject above mentioned to the engineer officers of that board, it would seem desirable to change the limits of one of the reservations from those originally proposed by the board. This reservation, as first recommended, and as
40 directed by the President to be made, was defined as follows: "From a point 800 yards south of the Point Jose to the southern boundary of the Presidio, along that southern boundary to its western extremity, and thence in a straight line to the Pacific ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos." Subsequent to this action of the board, a private claimant to all this tract proposed to the joint board, through Capt. Halleck, eng'r, to substitute the following bounds for those just mentioned, with the understanding that, if accepted by the government, the claimant would resign all pretensions to title within the reservation as thus modified, viz: The government to reserve the promontory of Point Jose within

boundaries not less than 800 yards from its northern extremity, and the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract to the southern extremity of a pond lying between Fort Point and Point Lobos, and north and east of a line passing through the middle of said pond and its outlet to the channel of entrance from the ocean.

These two tracts were thought by the joint board to be sufficient for the use of the government, instead of the large one before described, and they so stated in *in* writing to Capt. Halleck.

This department is of the same opinion; and believing that the interests of the government would be subserved and complication avoided by making the two separate reservation with the limits as last mentioned, recommends that the reservation be made accordingly.

No plat of the Presidio tract is on file in this office, and it is respectfully suggested that the the surveyor general of California be referred to Capt. Halleck, corps of engineers, at San Francisco, for sketches which will enable him to run the lines in conformity with the foregoing description.

The sketch herewith shows the reserves as originally proposed, and conjecturally drawn by the board; also the two separate reservations now proposed to be substitutes for it.

I have the honor to be, very respectfully, your ob't serv't,

JAS. G. TOTTEN,
Bt. Brg. Gen'l of Eng'rs.

WAR DEPARTMENT,
Washington, Dec. 29, 1851.

SIR: I have the honor to submit herewith for your consideration the draught of an order modifying and reducing the reservation at Fort Point and Point Jose, San Francisco harbor, California, prepared in conformity with the recommendations of the chief engineer, herewith enclosed, and to request your approval of the same.

Very respectfully, your obedient servant,

C. M. CONRAD,
Secretary of War.

To the PRESIDENT.

The reservation, including Fort Point, Point Jose, and the Presidio at the entrance of the harbor of San Francisco. California, made by an order dated November 6, 1850, is hereby modified and reduced so as to embrace only the following-described two tracts of land, viz:

1st. The promontory of Point Jose within boundaries not less than eight hundred yards from its northern extremity.

2d. The Presidio tract and Fort Point, embracing all the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract, to the southern extremity of a pond lying between Fort Point and Point Lobos, and passing through the middle of said pond and its outlet to the channel of entrance from the ocean.

MILLARD FILLMORE.

EXECUTIVE CHAMBER, *Washington, Dec.* 31, 1851.

The counsel for plaintiffs objected to the admissibility of these documents.

1. That the transactions evidenced by these documents was a compromise between the government and certain claimants under Benito Dias, whose land did not include the premises in question.

2. That the purpose of the proceeding was to cut off a portion of the reservation and not to extend its boundaries.

3. That their bounds do not include the premises in controversy.

4. That the order did not intend or purport to make a res-
46 ervation, but to direct a survey for the purpose of future action.

5. That a reservation could not be made out of the lands of the pueblo of San Francisco.

The court overruled the objections and admitted the testimony; to which ruling the defendant's counsel excepted, and his exception was duly noted.

It was admitted that the last order was transmitted from the War Department to the Land Office on the third of March, 1852, and from the Land Office it was sent to the surveyor general of California soon thereafter; and that the premises in controversy are within a circle drawn with a radius of 800 yards, mentioned in said
47 order, and shown on the map accompanying. It was proved by Richard C. Drum, assistant adjutant general of the department, that the premises in controversy with others was taken possession of under an order now produced and read in evidence in these words:

WASHINGTON, D. C., *October* 2, 1863.

To Brig. Gen. S. Wright:

The Secretary of War directs that you take military possession of Point San Jose, and erect the battery proposed for its defence; the question of ownership will be determined hereafter.

H. W. HALLECK, *Gen. in Chief.*

48 That General Wright proceeded at once to take military possession, and directed the engineers to construct the work on the point. The work had been completed when Gen. McDowell came here. The immediate possession of General Wright was the Point, and the ground which was formerly occupied by Mrs. Fremont, and two or three buildings inland from it. The occupancy did not extend to the plaintiff's place. He was required to leave about the 15th or 16th of June, 1865; General McDowell had then come into command. He came into command on the 1st July, 1864, and then proceeded to take possession of all the grounds of the reservation, and that included Mr. Grisar's place. A radius of 800 yards
49 from the Point would include his place, and the Bensly water works and the woollen factory to the east of him. General McDowell is in command as military commander of the department of California. He took possession as such, and the Point is now held by the military authorities.

It was proved by plaintiff, that if a line is run from the extreme northern part of Point San Jose due south, those blocks would lie to the east of it.

The defendant's attorney then put in evidence the map accompanying the communications from the General Land Office, which accompanied General Totten's report, referred to in the letter put in evidence, and which are hereto annexed.

50 The defendant's attorney then offered in evidence the decree of this court in the case of the United States *vs.* the city of San Francisco, rendered May 18, 1865. It was admitted that an appeal had been taken from the decree on the part of the United States, and was still pending.

Plaintiff's counsel objected to the admissibility of this decree in evidence pending said appeal. The court overruled the objection, and admitted the testimony, to which ruling the plaintiff, by his counsel, then and there excepted, and his exception was noted.

The said decree is in the words and figures following:

Circuit court of the United States, northern district of California.

51 THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case taken by the petitioner, the city of San Francisco, from the decree of the board of said commissioners to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid and confirmed to lands within certain prescribed limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the northern dis-

52 trict of California, pending said appeal; the said case having been transferred to this court by order of the said district court, under the provisions of section four of the act entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1, 1864; and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged, and decreed that the claim of the petitioner, the city of San Francisco, to the land hereinafter described as valid, and that the same be confirmed.

The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country,

53 namely, the seventh day of July, A. D. 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific ocean; and on the south by a due east and west line drawn so as to include the

area aforesaid, subject to the following deductions, namely, such parcels of land as have been heretofore reserved or dedicated to public uses by the United States, and also such parcels of land as have been, by grants from lawful authority, vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals in
54 proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust for the benefit of the lotholders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants.

San Francisco, May 18, 1865.

(Signed) FIELD, *Circuit Judge.*

Indorsed: Filed May 18, 1865.

GEO. C. GORHAM, *Cl'k.*
By W. F. HUESTIS, *D. C.*

55 The defendant's counsel here rested his case.

Plaintiff's counsel then put in evidence the petition to the board of land commissioners and their decree, which are in these words and figures:

To the honorable the board of commissioners to ascertain and settle private land claims in the State of California:

The petition of the city of San Francisco, a municipal corporation of said State of California, respectfully shows: That the said city claims a tract or parcel of land situate in the county of San Francisco and State aforesaid, and being so much of the peninsula
56 whereon the said city is located as will contain an area equal to four leagues square, said parcel or tract being bounded on the north and east by the waters of the Bay of San Francisco; on the west by the Pacific ocean; and on the south by a due east and west line including the area aforesaid.

In pursuance of the laws, usages, and customs of the government of Mexico, and an act of the departmental legislature of California of November 9, 1833, and proceedings in pursuance thereof, the pueblo of San Francisco was duly elected and constituted a municipal corporation with a municipal government, and with all the rights, properties, and privileges of pueblos under the then existing
57 laws during the said year 1833, and there was then and there, by the supreme government of Mexico in the manner by law prescribed, ceded and granted to the said pueblo for town land and for common land all and singular the premises hereinafter described.

The said pueblo continued and was the proprietor of all and singular the said premises, (except so much thereof as had been granted by the authorities of said pueblo in pursuance of law,) and the said

pueblo continued its existence as such municipality and proprietor until and after the accession of the government of the United States, July 7, 1846, and until by an act of the legislature of the State of California, entitled an act to incorporate the city of San
58 Francisco, the inhabitants and property of said pueblo are incorporated into a city, which city is now here exhibiting her claim to the premises aforesaid. The said act of the legislature of the State of California prayed to be taken and read as part of this petition. The same act was modified and changed by an act of the same legislature, passed A. D. 1851, which is also asked to be taken and read as part of this petition.

On the seventh of July, A. D. 1846, the then pueblo, now city of San Francisco, was a town of the population of about one thousand inhabitants, and on the third of March, A. D. 1851, the population thereof amounted to about thirty thousand persons, and that on
59 said seventh of July and on said third of March, the said pueblo and city, under and by virtue of the grant aforesaid, and under and by virtue of the laws, usages, and customs of the government of Mexico, California, and all and singular the premises aforesaid, (except as aforesaid,) were part and parcel of the land and premises of said pueblo and city.

There are several adverse claims to one herein set forth.

One Jose de Jesus Noe claims one square league, part of said premises, as particularly appears by his petition therefor now before your board, numbered 17 on the docket of claims. That Carmen le Brean de Bernal and Jose Corielea Bernal claim one square league,
60 part of said premises, which claim is more particularly exhibited in their petition therefor before your board, numbered thirty on the docket of claims. That Jacob Lewis Lees and Salvalor Vallejo claim two hundred varas square, part of said premises, which claim is particularly exhibited in their petition therefor before your board, numbered 74 on the docket of claims. That James V. Bolton claims three square leagues, (with exceptions,) part of said premises, which claim particularly appears in his petition before your board, and numbered 81 according to the docket of claims. That Josefa de Haro and others claim the protrero de San Francisco, being one-half square league, part of said premises, the par-
61 ticulars whereof appear in their claim before your board, numbered one hundred and one on the docket of claims. That John F. Spakess and others claim thirty-seven fifty-vara lots, part of said premises, particularly described in his petition on file with your board, and numbered 171 according to docket of claims. That the said John F. Shultess also claims forty-seven other fifty-vara lots, part of said premises, particularly described in his petition before your board, and numbered 172 of claims.

That Josefa de Haro and others claim premises known as the Laguna de la Merced, one league long and one-half league wide, and particularly described in their petition before your board, numbered one hundred and two of claims, and which is also part of prem-
62 ises herein first described.

That one Thomas O. Larkin claims a tract of land, parcel of said premises, and including a portion of the incorporated limits of the city of San Francisco, to the west and running thence westerly along the waters of the bay to the Pacific ocean, including the site of the presidio, the quantity or particular description of his claim this claimant is unable to state.

That Charles V. Stuart and Isaac N. Thorne claim a portion of said premises known as Ridley's ranch, under a grant to Jacob P. Leese, of one league and one-half, situate contiguous to and north of the Sanchez ranch, but a particular description thereof cannot be given by claimant.

63 The claimant represent to your honorable board that all and singular the foregoing adverse claims are insufficient and void. That all of them are made subsequent to the establishment of the pueblo of San Francisco, and that the grants therefor were in derogation of the lawful claim and right of the said pueblo.

That some of them were made after the government of Mexico in the department of California had been superseded by the authority of the government of the United States; that such is the fact, particularly in the case of the lands claimed by James R. Bolton as aforesaid, and in the case of the lands claimed by Thomas O. Larkin as aforesaid; and also in the case of the land claimed as

64 aforesaid by John Y. Schultess and others, and by John F. Shultess.

That all of the said claims are based upon grants made without authority of law, and in direct violation of the laws and regulations of the government of Mexico in force in California.

The said city of San Francisco now insists that by the treaty of Guadalupe Hidalgo, the laws of nations, and the laws and usages and customs of the government of Mexico in force in California, as also by the force of the act of the said State incorporating the said city, and the act of Congress of the United States entitled "An act to settle the private land claims in the State of California," ap-

65 proved March 3, 1851, the said city has good and lawful claim to all and singular the premises as aforesaid; and the said city relies upon the said laws, usages, and customs, and proceedings in pursuance thereof, upon the order made for the establishment of the pueblo of San Francisco, the record and other evidence of its existence, continuance, and extent. The grant to said pueblo as aforesaid, and upon such other evidence as may be adduced touching the premises, upon a full exhibition and consideration of all which premises it is prayed that such claim be confirmed.

J. H. McDOUGALL,
For the City of San Francisco.

Filed in office July 2, 1852.

GEO. FISHER, *Sec'y.*

Recorded in Record of Petitions, vol. 1, pages 151, 152, 153.

GEO. FISHER, *Sec'y.*

66 THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefor decreed that the same be confirmed.

The land of which confirmation is made, is that known by the name of the pueblo lands of San Francisco, and is bounded as follows: Beginning at the little cone to the east of the fort, and running across to the beach, so as to leave the fort and casa mater to the north; thence running along the beach to Point Lobos on its
67 southern part; thence a straight line to the summit of the Divisadero, continuing said line to the east as far as the Punta del Rincon, including the Camistales et Zentel, the said line will terminate within the Bay of the Mission Dolores, the estuary of which will form a natural boundary between the municipal jurisdiction of that pueblo and the said mission of Dolores; then along the shore of the Bay of San Francisco, as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor Jose Figueroa to Gen. Mariano G. Vallejo, dated Monterey, November 14, 1834, marked Exhibit No. 18, to the deposition of M. G. Vallejo, taken in
68 No. 280, H. J. T., and now on file among the papers in the case.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office.

GEO. FISHER, *Sec'y.*

Indorsement on the transcript of the record from the board of land commissioners:

JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Also the fact that the transcript from the said board of land commission, in that case, was filed in the district court of the United States for the northern district of California, on the third day of March, A. D. 1856.

69 Also the stipulations of defendant's attorney and of the attorneys for the claimants, and the order thereupon entered, which are in the words and figures following:

In the district court of the United States, northern district of Cal.

THE UNITED STATES
vs.
THE MAYOR AND COMMON COUNCIL OF THE City of San Francisco.

In pursuance of a notice from the U. S. Attorney General, here-

unto annexed, it is hereby stipulated and agreed that the appeal taken in this case from the U. S. land commission by the U. S. be dismissed; that the notice of intention to prosecute said appeal on behalf of the United States be withdrawn, and the claim-
70 ants have leave to proceed under the decree of said land commission in their favor, as under final decree.

San Francisco, May 30, 1857.

HALLECK, PEACHY & BILLINGS,
Att'ys for Claimants.
WM. BLANDING, *Dist. Att'y.*
J. B. CROCKETT.

Notice referred to.—California land claims.

Indorsed: Filed March 30, 1857.

JNO. A. MONROE, *C'lk.*
W. H. CHEVERS, *Deputy.*

ATT'Y GEN'L'S OFFICE, 27 *Feb'y*, 1857.

SIR: In the case of the claim of the city of San Francisco,
71 confirmed to the claimant by the com'rs, case No. two hundred and eighty, (280,) appeal will not be prosecuted by the United States.

I am, respectfully,

C. CUSHING.

At a stated term of the district court of the United States of America, for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the thirtieth day of March, in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The honorable Ogden Hoffman, dist. judge.

THE UNITED STATES
vs.
THE MAYOR AND COMMON COUNCIL OF THE CITY of San Francisco.

72. The attorney general of the United States, having given notice that appeal will not be prosecuted in this case, and a stipulation to that effect having been entered into by the U. S. attorney, on motion of the district attorney, it is ordered and adjudged and decreed that the appeal taken by the U. S. from the decision of the U. S. land commis'r in this case be dismissed, and that claimants have leave to proceed under the decree of said commission heretofore rendered in their favor as under final decree.

OGDEN HOFFMAN, *Dist. Judge.*

Indorsed: Filed March 30th, 1857.

JNO. A. MONROE, *Clerk.*
W. H. CHEVERS, *Deputy.*

Also the order certifying the case to the circuit court, and
73 the order allowing an appeal from the said decree, which are in the words and figures following:

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Monday the fifth day of September, in the year of our Lord one thousand eight hundred and sixty-four.

Present: Hon. Ogden Hoffman, district judge.

THE UNITED STATES
vs.
THE CITY OF SAN FRANCISCO. } No. 427.

It appearing to the court that by an act of the Congress of the United States, approved July 1, 1864, the above-entitled
74 cause, now pending under the act of March 3, 1851, may be transferred to the circuit court of the United States for California, ordered that said cause be and hereby is transferred to said circuit court.

OGDEN HOFFMAN, *District Judge.*

Indorsed: Filed Sept. 5, 1864.

W. H. CHEVERS, *Clk.*

Indorsed: Filed Sept. 27, 1864.

GEO. C. GORHAM, *Clk.*
Pr. W. F. HUESTIS, *D. C.*

U. S. circuit court, nor. dist. Cal., June term, 1866.

Present: Hon. S. J. Field, asso'te jus. U. S. Sup. Court.
June 12, 1866.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

On reading the mandate of the Supreme Court of the
75 United States, bearing date on the twenty-ninth day of January, one thousand eight hundred and sixty-six, directed to the judges of this court, commanding them to allow an appeal on behalf of the United States to the Supreme Court, from the decree of this court entered in the above-entitled cause on the eighteenth day of May, one thousand eight hundred and sixty-five, it is ordered, in obedience to said mandate, that an appeal to the Supreme Court on behalf of the United States from the decree of this court in the above-entitled cause, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same is hereby, granted, and that a certified transcript of the record of the
76 proceedings in the said cause be sent to the said Supreme Court without delay.

San Francisco, June 12, 1866.

A true copy from the minutes of the U. S. circuit court, June 12, 1866.

GEO. C. GORHAM, *Clerk.*

Indorsed: Filed June 12th, 1866.

G. C. GORHAM, *Clerk.*

The case was here closed, and after argument was submitted to the court, and the judge afterwards filed his finding for the defendants, to which finding the plaintiff, by his counsel, duly excepted.

77 And inasmuch as the said several matters so produced and given in evidence, and the rulings and decisions of the court, and the objections and exceptions thereto by the counsel for the plaintiff, do not appear by the record of the said cause, the Hon. Stephen J. Field, the judge before whom said cause was tried, hath, at the request of the counsel of the plaintiff, according to the form of the statute, put his hand and seal to this bill of exceptions, this fourteenth day of June, A. D. eighteen hundred and sixty-six, and of the independence of the United States the ninetieth.

[SEAL.] STEPHEN J. FIELD.

(Here follows maps marked Nos. 1, 2, 3, and 4, page 77.)

78 *Opinion.*

EMIL GRISAR
vs.
IRWIN MCDOWELL.

This is an action of ejectment, to recover the possession of certain real property situated at or near the place known as Black Point, or Point San Jose, in the city of San Francisco. The plaintiff claims to be the owner in fee of the premises, deriving his title from the city of San Francisco, by virtue of the ordinance of the common council for the settlement of land titles in the city, passed on the 20th of June, 1855, commonly known as the Van Ness ordinance, and the act

79 of the legislature of the State ratifying and confirming the same. The defendant is an officer in the army of the United States, commanding the department of the State of California, and as such officer, acting under the authority of the United States, entered upon and now holds possession of the premises as part of the public property of the United States, reserved for military purposes.

At the time the ordinance named was passed, the city of San Francisco asserted title as successor of a Mexican pueblo, established and in existence on the acquisition of the country, to four square leagues of land, embracing the site of the present city, and had presented

80 her claim for the same to the board of land commissioners created under the act of March 3d, 1851, and the board had confirmed the claim to a portion of the land embracing the premises in question, and rejected her claim for the residue. Dissatisfied with the the limitation of her claim, the city has prosecuted an appeal from

the decision of the board to the United States district court, and this appeal was then pending and undetermined. By the second section of the ordinance, the city relinquished and granted all the title and claim which she thus held to the land within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or
81 tenants, on or before the first of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. In March, 1858, the legislature of the State ratified and confirmed this ordinance. The party through whom the plaintiff traces his title was in such actual possession of the premises in controversy, both at the time designated by the ordinance, and also on the passage of the confirmatory act of the legislature, and therefore acquired whatever right or title the city possessed; and he improved
82 and cultivated the premises and erected a building thereon, which was occupied by the plaintiff as his residence when he was removed by the defendant.

On the other hand, the authorities of the United States have, since 1850, claimed the right to hold the premises as lands set apart for public purposes. In November of that year, President Fillmore ordered that they should be exempted and reserved from sale for such purposes; and in June of the following year, notice of this order was communicated by the Commissioner of the General Land Office at Washington, to the surveyor general of the United States for California, and has ever since remained on file in this office. This
83 order has been modified in some respects, and the land designated by means of a map with greater precision than was done in the first instance, but it has never been revoked, although actual possession of the entire portion was not taken until it became necessary for the protection of our commerce to have the fortifications of the harbor increased.

The question presented is, therefore, between the title of the city, as it existed on the first of January, 1855, and the title of the United States. It may be considered as settled that a pueblo of some kind existed at the site of the present city upon the acquisition of the country by the United States on the seventh of July, 1846;
84 that the pueblo possessed some claim to or interest in lands to the extent of four square leagues, measured off from the northern portion of the peninsula upon which the city of San Francisco is situated; and that the city succeeded to the claim and interest of the pueblo. This has been been frequently held by the courts of the State and by this court. And though the fact is not admitted in this case by the counsel of the government, it is not seriously controverted by them. We shall assume such to be the fact in the consideration of the case; it is upon the supposed existence of such fact that the pretension of the plaintiff rests.

85 It is difficult to state with precision the exact character of the title or interest which the pueblo possessed in the munic-

ipal lands. It is sufficient to say that the government undoubtedly retained the right to control the use and disposition of these lands, until, by action of the officers of the pueblo or other competent authority, they became vested in private proprietorship. Numerous grants to individuals, within the limits of the four square leagues claimed, were made by the governors of the department, some with and some without the sanction of, or even consultation with, the authorities of the pueblo. If they could thus pass the title to private persons, it would seem to be a reasonable inference that they could reserve
86 from the disposition of those authorities such portions of the lands as might be required by the government for public purposes. And this is the conclusion expressed by this court in the opinion rendered when the pueblo case was decided. This power of control and disposition which existed with the former government passed, upon the cession of the country, with all other public rights, to the United States, and could at any time thereafter be exercised in furtherance of their policy or the execution of their laws. Whoever took possession of any of the municipal lands over which the United States had thus exercised their power, held such lands
87 at the pleasure of the government. This view meets and overthrows the pretension of the plaintiff. Though the order of the President exempts and reserves the lands from use, using the language employed when a reservation is made of public lands to which no adverse claim is asserted, and which but for such reservation would be open for sale and settlement, yet it is as expressive of an intention to withdraw them from the control and disposition of the authorities of the pueblo as if it had in terms so declared.

There is another view of the title or interest of the pueblo to her municipal lands which leads to the same conclusion. That
88 title or interest, whatever it may have been, was an imperfect one; it was, in fact, only a restricted and qualified right to alienate portions of the lands in lots for building or cultivation, and to use the residue for commons, for pasture lands, or as a source of revenue, or other public purposes, subject, however, in all particulars, to the control of the government of the country. Further action of that government was therefore necessary before absolute ownership could be affirmed in the pueblo. And since the change of jurisdiction, this imperfect right of the city, the successor of the pueblo, to her lands, required recognition and action of the
89 new government before it could be turned into an indefeasible estate as known to our laws. The lands, too, had never been designated and measured off by the former government, and remained in this respect undefined upon the acquisition of the country. The claim of the city had therefore to undergo judicial investigation before the board of land commissioners, created under the act of March 3d, 1851, and to depend for its validity and extent upon the determination of the board and of the tribunals of the United States to which it could be carried. The authorities of the city so regarded the claim, and by their direction it was presented to
90 the board in July, 1852. In December, 1854, the board con-

firmed the claim, as we have already stated, to a portion of the four square leagues, and rejected it for the residue. From the decision an appeal was taken, by the filing of a transcript of the proceedings and decision of the board with the clerk of the district court. The appeal was by statute for the benefit of the party against whom the decision was rendered, in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their intention to prosecute the
91 appeal. Subsequently, in February, 1857, the Attorney General withdrew the appeal on the part of the United States, and in March following, the district court, upon the stipulation of the district attorney, ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. This leave was not accepted, and the case remained until September, 1864, in the district court upon the appeal of the city. This appeal kept the whole issue open, the proceeding in the district court being in the nature of an original suit, in which new evidence was admissible, and in which new positions could be assumed.
92 (United States *vs.* Richie, 17 How. 534; The city of San Francisco *vs* the United States; and Le Roy *vs.* Wright, *et al.*) On the first of July, 1864, Congress passed the act "to expedite the settlement of titles to land in the State of California." By the fourth section of this act the district courts of California were authorized to transfer cases for the confirmation of claims to land under the act of March 3d, 1851, pending before them an appeal to the circuit court of the United States, when they affected the title to lands within the corporate limits of any city or town. Under this act the district court, in September, 1864, transferred the pueblo case to the circuit
93 court, and in October following, the circuit court confirmed the claim of the city to four square leagues, subject to certain exceptions, among which were all such parcels of land as had been, previous to that time, "reserved or dedicated to public uses by the United States." The lands thus reserved from the confirmation include the premises in controversy in this case. The right asserted by the plaintiff meets this conclusion by the fact that an appeal from the decision has been taken to the Supreme Court. This appeal he insists suspends the operation of the decree, and takes from it all efficacy as evidence of title. Such undoubtedly is the general effect of an appeal in these land
94 cases; that is to say, the decrees rendered therein will not support the title of the confirmees or those claiming under them, pending appeals therefrom, when by the judgment of the appellate court the claim of the confirmee to the premises in controversy may be defeated. But such cannot be the effect of any judgment of the Supreme Court in the present case; that court can hear the case only upon the record, and can affirm or reverse, or modify the decree only in those particulars in which error is alleged by the appellant. And and the city has not appealed; she does not seek a reversal of the decree which excludes from confirmation to her the lands in
95 controversy. The United States are the appellants, and a judg-

ment rendered in their favor could only have the effect of defeating the entire claim of the city, or of restricting its extent in a still greater degree. We say the city has not appealed; she applied at the October term for an allowance of an appeal from so much of the decree as includes in the estimate of the quantity of four square leagues confirmed, the parcels of land reserved or dedicated to public uses; in other words, she asked an appeal, not to obtain a reversal of the decree in that it excluded the reserved lands from the confirmation,
but in that the decree did not give to her four square leagues
96 after excluding them. The allowance was, however, refused,
and no action has since been taken by the city in the matter. It follows that the decree of the circuit court, as rendered, is conclusive upon the title of the plaintiff; it determines finally the validity of the reservation of the United States; it adjudges that the title has been in them since the conquest, or at least since the date of the reservation they claimed in 1850.

Judgment must therefore pass for the defendant.

FIELD, *J.*

July 17, 1866.

97 U. S. circuit court, district of California.

EMIL GRISAR
vs.
IRWIN MCDOWELL.

I, Geo. C. Gorham, clerk of the circuit court of the United States, district of California, do hereby certify that the foregoing ninety-four pages contain a full, true, and correct transcript of the record in the case of Emil Grisar, plaintiff, *vs.* Irwin McDowell, defendant, as the same remain of record and on file in the clerk's office of said circuit court.

Witness my hand and the seal of said court this 26th day of October, A. D. 1866.

[SEAL.]

GEO. C. GORHAM, *Clerk.*
By SAMUEL NEALL, *D. C.*

SUPREME COURT

OF THE

UNITED STATES.

EMIL GRISAR,

Plaintiff in Error,

vs.

IRWIN McDOWELL,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

DELOS LAKE,

Of Counsel for Defendant in Error.

SAN FRANCISCO:

TOWNE & BACON, BOOK AND JOB PRINTERS, EXCELSIOR OFFICE,

No. 536 Clay Street, just below Montgomery.

1867.

SUPREME COURT

OF THE

UNITED STATES.

EMIL GRISAR,
Plaintiff in Error,

vs.

IRWIN McDOWELL,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This is an action of ejectment. General McDowell is the nominal defendant of record; but the United States are the real defendants. (*Wilcox* v. *Jackson*, 13 Pet. 516.)

Though the defendant was in the possession of the lot in controversy, at the time of the commencement of the suit; and the naked presumption of title, therefore, is

in his favor; yet, as it appears that the plaintiff previously had the possession, the question becomes, in the end, a question of title; and therefore, whichever party, the plaintiff or the United States, has the title, will succeed in the suit. Has, then, the plaintiff the title, or is it in the General Government? Has the plaintiff the *legal title?* For, he must have a strictly *legal title*, and not merely an inchoate or equitable title, or he cannot succeed in his suit. (*Greer* v. *Mezes*, 24 How. 274.)

The plaintiff rests the proof of his title upon four propositions: 1st. That San Francisco was a Pueblo. 2d. That, as such, and by operation of law, it took, under the Spanish or Mexican government, the title in *absolute proprietorship* to four square leagues of land. 3d. That the four square leagues so held, include the *locus in quo.* 4th. That the plaintiff has acquired the title of the Pueblo to the *locus in quo.* Most of his brief is made up in endeavoring to support these propositions. It contains, however, some other particulars, which will not be passed over by us.

We think we might with safety rely for our defence on the simple fact, that the plaintiff has not sustained his first proposition by any proof. He has not produced any evidence by which to establish the existence of a Pueblo; or from which the presumption of the existence of a Pueblo could arise. He has not proved any such organization as goes to make up a Pueblo. He has not shown that there was an Ayutamiento; or that there were Alcaldes, or Regidors, or Sindicos, or other proper officers of a Pueblo. Above all, he has

not given any "local habitation" to the Pueblo—he has not furnished it with any fixed bounds—he has not shown that the *locus in quo* was within its range. The Court is asked to take judicial notice of these matters. We contend that this cannot be done.

In a contest between the General Government, on the one hand, and a private individual on the other, in respect to the ownership of land in California, the burden of proof lies on the individual claimant to establish the fact that the Government has parted with its original title. The presumption is, in the outset, that the title to all lands in California is in the Government, the source and fountain of all title. When, therefore, an individual brings suit against the Government, or against a person who is in possession of land under authority from the Government, he must make out, as the very foundation of his action, either that the Spanish or Mexican government, while California was under their dominion, or that the United States government, since the acquisition of the country, has severed the subject matter of the controversy from the mass of the public lands and permitted the same to be reduced to private ownership. In other words, the presumption of title is in the Government; and this presumption must prevail until the contrary be established by proof of the severance of the *locus iu quo* from the public domain. So also, in case the Government brings ejectment against an individual to recover a piece of land, the presumption of original title is sufficient to make out a *prima facie* case. (*Wendell* v. *The People*, 8 Wend. 183:

The People v. *Dennison*, 17 ib. 312.) Nor is this doctrine, in so far as it regards lands in California, affected by the case of *The People* v. *The Rector, &c. of Trinity Church, et. al.* (22 N. Y. Rep. 44.) We start, then, with the presumption of title in the United States. The plaintiff must prove, as the first step of his progress, that Spain, or Mexico, or the United States, has parted with the title, either by particular grant, or by some special or general law. This the plaintiff has not done.

Conceding, however, that there was a Pueblo, what is the meaning of such an organization? Does it carry with it the idea of ownership of lands? If so, of what quantity, and where and how located? Does the word, *ex vi termini*, import the acquisition of a title to real property? and what kind of a title, legal or equitable, usufructury or in fee, conditional or absolute, temporary or permanent? By what documents is the claim to be manifested? Was a regular *espediente* necessary? Did a Pueblo take all the lands within the jurisdiction of its civil or municipal government? Or what quantity less? How, and by what officer, and by what authority, were lands measured off and segregated from the rest of the public lands? Was the action or approval of the Governor, or of the Departmental Assembly, or of the Prefect or Sub-Prefect necessary? Was any segregation necessary; and how were the lands assumed to be granted, identified? Was there to be any survey of them, or any monuments to be set up to designate their limits?

Before proceeding to the consideration of these questions, we wish to remark, that though the Pueblo may have had an equitable title, which would be protected by the Treaty of Gaudalupe Hidalgo, still, if it were but an equitable title, it would not be sufficient to enable the plaintiff to maintain this action of ejectment. There could be no perfect legal title, without survey and segregation. (*The United States* v. *Pacheco*, 22 How. 226.) In the opinion in this case it is said: "The Court is not dealing with a legal title; *none can exist until there is a survey*," &c. In *Yontz* v. *United States*, (23 How. 498) the Court say: "The claimants before us come presenting *an equity;* their title not being completed, because the land has never been surveyed and severed from the public domain; citing *Hanson's case*, 16 Pet. 200, and *Rosa Pacheco's case*, *supra.*

We come now to the examination of the nature and character, and of the rights and property of a Pueblo under the Spanish and Mexican governments, and particularly of the Pueblo of San Francisco.

After California came under the political jurisdiction of Mexico, as a government independent of Spain, it was designated sometimes as a Department, and sometimes as a Territory; but, whether the one or the other, the internal political divisions were always substantially the same. The Department or Territory was first distributed into large districts, called "Distritos," which were presided over by a Prefect. Each "Distrito" was also divided into two smaller political portions called "Partidos," at the head of the govern-

ment of which was a Sub-Prefect; and out of a Partido might be, and in a few instances was, carved a smaller political division, called a *Pueblo.* As the whole Department or Territory was subject to the government of an officer indifferently called Governor or Political Chief; as the Distritos were subject, under the Governor or Political Chief, to the more immediate supervision of the Prefect; and as the Partidos were subject, under the above named superior officers, to the still more immediate jurisdiction and authority of the Sub-Prefects; so the Pueblo, subject immediately to the Sub-Prefect, and through him to the Prefect and Political Chief, were still more directly and immediately under the government sometimes of an Alcalde, at others of an Ayuntamiento, and at others of a Justice of the Peace (*Juez de Paz*). But by whichever of those last-named authorities the affairs of a Pueblo were directed and managed, the Pueblo itself was, like the Distrito and the Partido, but a political division of the Department or Territory. (*Sixth Constitutional Law of Mexico, adopted December* 29, 1836, *cited at p.* 100, *of Addenda to Mr. Dwinelle's Colonial History of San Francisco.*) It will be noticed, however, that this law, while it gives a general idea of the distribution of political and civil power at all times, was in force only during a limited portion of the history of California. Although the term "Pueblo," in its meaning as applied to a political division of a country, may answer generally to the English word *Town*, yet where used to designate the tract of country embraced within the

jurisdiction of the Ayuntamiento of San Francisco, it would correspond more nearly with the American division of *County*, the Ayuntamiento answering very nearly to the Board of Supervisors of a county. Thus the Pueblo of San Francisco, when governed by the Ayuntamiento, instead of being circumscribed within the narrow limits of the present city of San Francisco, or even within the four square leagues confirmed to it under the proceedings before the Land Commissioners, lately terminated in the Supreme Court, stretched out over a large extent of territory both east and north of the Bay, including the present counties of Marin, Sonoma, Contra Costa, and Alameda, and embracing in the whole an area, exclusive of land covered by the waters of the Bay, of more than a hundred square leagues. Indeed, so extended were the limits of the Pueblo, and so difficult was it for the residents in the more remote portions on the eastern side of the Bay to perform their duties if elected members of the Ayuntamiento or other officers of the Pueblo, that they petitioned to be separated from the jurisdiction of the Pueblo of San Francisco, and to be annexed to that of the Pueblo of San José. (See Dwinelle's History, etc., Addenda, p. 44, No. XXIX.) But we do not find it claimed that the Pueblo had any proprietary interest in this vast extent of territory. Yet, if a Pueblo, merely by force of its organization as such, and without any grant or law conferring rights of ownership upon it, became entitled to any land whatever in absolute proprietorship, why should

it not be entitled to all the land within its limits? Whether there be any law under which absolute ownership may be claimed, and, if so, what is the scope of such law, will be hereafter inquired into. The only thing which we insist upon here is, that it does not follow, because a given district was organized under a species of civil government to which was given the appellation of "Pueblo," that therefore such organized government or Pueblo was vested with the title to any land whatever. Under the Spanish and Mexican system, a Pueblo, merely by becoming such, no more became vested with a title to land, either absolute or qualified, than a city, or town, or county, under the American system, became, merely from the fact of its organization as such, the proprietor of all or any portion of the lands within its boundaries. And as, under our system, if a city, or village, or town, lays claim to the ownership of a particular piece of land, it is necessary for it to prove its deduction of title from the original sovereignty, so, under the other system referred to, it is equally necessary for a Pueblo or a city, when it claims to be the owner of a portion of the lands within its civil jurisdiction, to show that it has derived a title thereto in some way, from the former owner or from the sovereign power. These views seem to us to be so elementary and just, that, did we not consider the influence which interest, prejudice, and erroneously preconceived notions have over the mind, we should be at a loss to imagine how it was ever possible for any

sane man, much less a lawyer or a judge, to question or doubt them.

We shall, therefore, assume as an undoubted postulate from the foregoing remarks, that the Pueblo of San Francisco, or the parties who claim title derived under such Pueblo, must, in order to make out a title, show how they have acquired it. They must show that the Pueblo either had a grant of lands from the Spanish, or Mexican or American government, or by virtue of some general or special law enacted by one of those governments while California was under its dominion, became vested with some title, qualified or absolute, to some defined portion of the lands within its jurisdiction.

It is not now, although at one time it was, pretended that an actual grant, as by letters patent, has ever been made by the Spanish or by the Mexican government, of any lands whatever to the Pueblo of San Francisco. If, therefore, it holds or ever held the title to any portion of territory, it must be by reason of some general or special law. There is no special law applicable alone to San Francisco, and giving or conceding to that Pueblo any lands; and, consequently, if it have any lands, it must be by virtue of some general law. Now, it is not denied that there are general laws of Spain which authorized territory to the extent of four square leagues to be marked out and dedicated to the use of Pueblos, for certain purposes specified in the general laws. But until such lands were marked out and separated from the public domain, and the

proper measures taken by a regular *espediente* to vest the qualified title in the Pueblo, all the lands within its jurisdiction continued to constitute a portion of the *unsevered national* property. Under the American government every citizen, the head of a family, is entitled to one hundred and sixty acres of land, by settling upon it, and complying with the laws to obtain a segregation of such land from the rest of the public domain. But a mere settlement on the land is of itself nothing. Until segregation, the settler acquires no right, either perfect or inchoate. So with a Pueblo under the Spanish and Mexican governments. The simple settlement of a few individuals in a district of country did not *per se* confer upon them a right to four square leagues. Nor was it sufficient for this purpose that they should be regularly organized into the civil division called a Pueblo. Such organization only gave them a *capacity* to take. Something more was necessary to vest a title. That could only be done by taking all the steps to make up what in Spanish and Mexican law terminology is called an *espediente*. It was necessary that the authorities of the Pueblo should present a petition to the Political Chief, asking that lands be set aside for the use of the Pueblo—that the Political Chief should have granted the prayer of the petition, and referred it to the Prefect or Sub-Prefect, for him to make the necessary investigation as to what lands in the vicinity of the Plaza of the Pueblo remained ungranted; that the Prefect or Sub-Prefect should report back to the Political Chief;

that thereupon the latter should determine what lands remained undisposed of, which might be set aside for the future benefit of the Pueblo; that an officer duly appointed should then proceed to mark out the Pueblo lands, and that his proceedings should be returned to the Political Chief for further action; that the latter might then approve or disapprove in whole or in part, might annul the whole assignment as made by such officer, might direct another measurement of the lands, or might refuse to proceed any further—in fine, might assign a part or the whole of four leagues in a contiguous body or interspersed with other lands before granted to other single settlers. No Pueblo could say that it was possessed of any lands, for any purpose, until these steps had been taken; and until the lands had been marked out and the boundaries set up, (*amonajado*), so that all could know what were, and what were not, Pueblo lands. Until these steps were taken, a Pueblo had merely an *equitable claim to have lands set aside* for it. And such is the view which the legislation of Congress has taken of the subject, as will hereafter be more particularly shown.

"A Pueblo," says Mr. Dwinelle (p. 7 of History of San Francisco) "had a political jurisdiction embracing all the legal voters within a certain territory." And the judicial officers of the Pueblo had a jurisdiction co-extensive with the political jurisdiction. But this political and judicial jurisdiction was entirely different from a proprietary interest.

That the method of proceeding in organizing a

Pueblo was as above noticed is manifest from the official directions given by Governor Nicholas Gutierrez in reply to certain inquiries propounded to him by the Ayuntamiento of Monterey. The Governor commences his "officio" in this wise; (see page 51 of Addenda to Dwinelle's History): "The Pueblos that have their *jurisdictional* but not their *municipal* boundary defined, should, by means of the political Government, send their petition to the Deputation, (that is, the Departmental Assembly) in order that the petition may be granted by that body:" (I have taken the liberty of varying the translation of the last line from that given by Mr. Dwinelle, in order to make it express more nearly the meaning of the original) "for this purpose," proceeds the "officio"—that is, for the purpose of having the *municipal* boundary of the Pueblo defined, whose jurisdictional boundary had already been marked out—"an exact map of the tract petitioned for must be enclosed, (that is, traced out) as was done in the last year by this illustrious corporation, when it solicited that its municipal boundaries might be defined."

In the foregoing sentence we have the distinction clearly taken between the *jurisdictional* boundary of a Pueblo and its *municipal* boundary; from which the inference is irresistible, that a fully organized Pueblo might exist, having its governmental and judicial powers in full force, and the territory over which they extended marked out and defined, without having its municipal territory set aside or segregated. Now, this was just the condition of the Pueblo of San Francisco.

It had its jurisdictional boundary irregularly though sufficiently defined, which extended, as been above mentioned, over the present counties of Marin, Sonoma, Contra Costa, Alameda, San Mateo, or, at least, over large portions of these counties, and stretching out a great distance across the Bay, both to the north and east, and southeast. Within this large tract of country, over all of which the governmental and judicial jurisdiction of the Pueblo of San Francisco extended, and all of which constituted a part of the public domain of Mexico, except such portions as had been granted out to Rancheros or settlers, the municipal boundaries of the Pueblo might have been set off, on application for that purpose. But they never were set off; and there is no evidence, and, in fact, no probability, that any application for that purpose was ever made. The Pueblo of San Francisco never sent its petition to the Territorial or Departmental Deputation, to have its municipal boundaries set off, according to the method prescribed as the proper course by Governor Gutierrez. It never had a map made to base such petition upon, according to the course further pointed out by Gutierrez. It had only a *possibility* of municipal territory—only a claim, which cannot be called even an equitable claim, to have such territory defined at some future time, should the Government see fit so to do.

But this is not all. Even if the municipal boundaries had been marked out, it does not follow that the Pueblo became vested with any title to lands. Let us see what further Governor Gutierrez says in the same document:

"The municipal *termino* having been defined, and the expenses of the Ayuntamiento being high, it may solicit, through the same channel, that within the boundary assigned, certain lands may be assigned to it as "propios," and the Ayuntamiento may propose, in their petition, those which appear to be the most appropriate. To this effect it will annex to its petition a general account, including both its petty (ordinary) and extraordinary expenses, graduated for the term of five years, so that the deputation and political chief, being satisfied with them, may grant the petition."

How little does this language read like there being anything compulsory on the Government to make a grant of "propios"—more especially of "propios" of any fixed, settled extent. How little does it savor of a foregone conclusion that the Pueblo was, merely by virtue of its political organization, vested with a title to four square leagues. In the first place, the Government may, or may not, in its discretion, assign municipal boundaries to the Pueblo out of the greater extent of the jurisdictional boundaries. In the next place, after it has assigned the municipal boundaries, it may or may not, in its discretion, assign its "propios" to the Pueblo. And, in order to procure an assignment of "propios," it was necessary for the Pueblo to present its petition to the Departmental Government; and in case the petition was granted, the bounds of the "propios" had to be actually marked out and defined in the same manner, and with the same formality, as the municipal boundaries had to be marked out.

But even the "propios," when assigned, did not become the absolute property of the Pueblo. It could not sell them, or grant them, or give them away: its sole power was to lease them for a term not exceeding five years. The "terrenos de propios," says Governor Gutierrez in the same document quoted above, "are lands assigned to the Ayuntamiento, so that by leasing them to the best bidders, for a term not exceeding five years, they may defray their expenses by the proceeds; and the Ayuntamiento may propose the amount of rent, mentioning it in the petition which is presented." Now, if even the "propios" did not become the *property* of the Pueblo, how much less probable is it that the rest of the lands within the municipal boundaries were vested in the Pueblo?

There is not, nor has there ever been, produced one particle of evidence, either documentary or otherwise, to show that any "propios," or even municipal boundaries, were ever assigned to the Pueblo of San Francisco. Nor does any probability arise that such was the case, either from the laws of Spain or Mexico, or from the population and circumstances and character of the less than little hamlet at Yerba Buena, or from its relative condition to the Presidio and Mission of San Francisco, which were in the immediate vicinity. On the contrary, all the probabilities are directly against such a supposition.

But to return to the same document of Governor Gutierrez: "The *termino municipal* and the *terrenos propios* having been defined," he proceeds: "the

Ayuntamiento may define or assign that which it requires for *ejidos*." The *ejidos may be* assigned; but until they *are* assigned, the Pueblo has no more claim to, or interest in, the land which *might be* so assigned, than in any other portion of the public domain: and, even after such assignment, the Pueblo had only an usufructuary interest for the benefit of its inhabitants, which was liable to be terminated whenever the Government should see proper to appropriate such lands to its own use; unless the lands were sooner disposed of by the Pueblo, as the agent of the Government, to actual settlers for building lots."

"And by *ejidos*," says the same document of Governor Gutierrez, "are understood lands that are immediate to, and in the circumference of, the Pueblo, (that is, of the *propios* already assigned) which serve both for the relief and the convenience of the inhabitants, who may keep therein a few milch cows and horses for their use, and to form walks or alleys which may adorn the entrance of the place, so that the *ejidos* may have a quarter or a half league around the town, which is sufficient for its ventilation, and *the Ayuntamiento may dispose of these lands for building lots.*"

The *ejidos* may consist of a *quarter* or a *half* league. This does not look as if there was an invariable rule laid down for all Pueblos—that each should have just so much land, no more, and no less, for *ejidos* or for *propios*, or for any other purpose. The truth is, that for different Pueblos different quantities of land might be and were assigned; but, in no case could the assignment

enclose more than four square leagues. It might be greatly less, but could never be more than this quantity; and until lands were assigned, marked off, and monuments set up, the Pueblo had none at all of which it could claim even the exclusive use.

I call attention particularly to the last words of the paragraph last cited, from the document of Governor Gutierrez—"the Ayuntamiento may dispose of these lands (*ejidos*) for building lots." Why should this power to dispose of the *ejidos* for building lots be thus specially given to the Ayuntamiento, if the title were absolutely vested in the Pueblo? The fact of this special power being thus given, clearly implies, that the Government considered the *ejidos*, even after they had been marked off, as still belonging to itself, subject only to the temporary usufruct of the inhabitants of the Pueblo, except such portions as should be appropriated to particular settlers for building lots. When this had been fairly done by the Ayuntamiento for the benefit of actual settlers, then, and not till then, were such portions finally severed from the public domain; then, and not till then, did such lots become private property.

That this is so, clearly appears from a preceding sentence in this same document of Governor Gutierrez. After having explained the authority of the Ayuntamiento, over the *terrenos de propios*, to lease them to the best bidders, for a term not exceeding five years, the very next sentence proceeds thus: "THE LANDS THAT REMAIN, AFTER THE ASSIGNMENT OF THE

PROPIOS, AND THAT ARE NOT GRANTED TO ANY PERSON, REMAIN AS VACANT LANDS, AT THE DISPOSAL OF THE GOVERNMENT." Can any thing be more plain and express than this? The authorities of the Pueblo have power, as distributors of portions of the public domain, to grant lots to actual settlers, out of the *ejidos* of the municipal territory; but all the lands within such municipal territory, save such as may have been set apart as *propios*, or may have been thus granted out to settlers, *remain vacant lands, at the disposal of the government.*

The definition of municipal territory, or *termino municipal* is given by Governor Gutierrez in the same document as follows: "By *termino municipal* is understood, that land, which *has been* assigned to the Pueblos for the relief of their herds, within which neither the cattle nor inhabitants of neighboring pueblos can enter for the purpose of grazing or cutting wood, without being denounced, unless they have some letter of commonalty." It appears from this that the *termino municipal* of one Pueblo was marked off merely in order to show the boundary line between that and another Pueblo; for the purpose of enabling the citizens of each to know within what bounds they were obliged to keep their herds, and to what extent they might proceed in order to procure wood, without trespassing on the rights of others. But there is not the least reason to suppose that the marking off of this *termino municipal* operated as a segregation of the lands within it from the public domain. Much less can such segregation be supposed without even marking out the limits of the

termino municipal. And in the case of the Pueblo of San Francisco, not even this was ever done.

The reasons which drew forth this document from Governor Gutierrez, furnish a complete commentary on the document itself. It appears that one Gabriel Espinosa had petitioned the Ayuntamiento of Monterey for a lot, for the purpose of building and for cultivation out of the *ejidos* of that Pueblo. This petition was referred to the Governor or Political Chief for information, whether it was within his province to make the grant, or to determine whether it should be made or not, or whether it solely belonged to the Ayuntamiento to dispose of such common lands. (See *Document signed Jose R. Estrada on page* 50 *to Addenda to Dwinelle's History of San Francisco.*) In reply, the Political Chief, Gutierrez, states that one Ramon Estrada, in soliciting a place called *del toro*, made his application to the government; that is, to the Political Chief, and that the same course was taken by one Juan Antonio Muños with respect to a piece of land called *la peurta del rey i nacional*, both of which were included within the limits of Monterey; and the Governor, therefore, declares that if Señor Espinosa solicited a town lot, for building a house and land for cultivation, under a lease for a limited time, the Ayuntamiento might grant it to him; but if he desired the absolute ownership of the same, he must take the same course as the other persons above mentioned, that is, must make his application to the Governor. (See *Document signed Nicolas Gutierrez on page* 50 *of Addenda to Mr.*

Dwinelle's History of San Francisco.) Now the question arises: Why should an application be made to the Governor for the grant of a lot of land out of the *ejidos* of the Pueblo of Monterey, if the title to such lands was vested in the Pueblo? if the Pueblo, solely by virtue of its being a Pueblo, was vested with an absolute title to the lands which had been actually assigned to it for *ejidos?* The truth is, that no one ever imagined that a Pueblo was, in any event, even after its municipal boundary had been traced out, and its *propios* assigned, and its *ejidos* set apart, the absolute owner, or the owner in fee, as we term it, or any owner at all as against the government of any lands whatever, until the Americans came here, and it became their interest that the Pueblo should own, at least, all the lands on the Peninsula in order that they might derive a title to themselves from under the Pueblo. It is to be presumed that Gutierrez, an educated Mexican, and the Governor of the Department, and who had all his life been accustomed to the system of government and administration under which Pueblos were organized, must have been as well acquainted with the rights of Pueblos in California as the Americans who had never been accustomed to the peculiarities of the system, and to whom the very term was, in the outset, a stumbling block.

It is not a little remarkable to observe how careful the opponents of the doctrine advocated by us always are, when referring to the above "officio" of Governor Gutierrez, to omit all reference to that portion of it which

declares *that the lands which remain, after the assignment of the "propios," and which are not granted to any person, shall remain as vacant lands, at the disposal of the Government.* This official declaration alone, if we are to suppose that the Governor understood the laws and customs of his own country as well as we do, is conclusive as to the interest of the Pueblo in lands.

What we have above said more particularly in reference to the *propios*, applies with still greater force to the "dehesas," or great pasture grounds intended for the support of the large herds belonging to the inhabitants of the Pueblo. The title to these lands, and the right of disposing of them, belonged at all times to the Government, as well after as before they were assigned to the use of a Pueblo. Law 14, Title VII, Book IV of the Leyes de las Indias declares that each Pueblo was entitled to have its *dehesas* assigned. But until they were assigned in due form of law, the Pueblo had not even an exclusive usufruct of the lands in the vicinity for grazing purposes; and after they were assigned, the use might at any time be resumed by the Government, in whom the title all the while continued to be. Mr. Dwinelle, in his History of San Francisco, (p. 12) speaking of the *dehesas* "as the great cattle pastures in which the inhabitants had a right of commons," subjoins: "but which the Government *could* dispose of—which the Government, at one time, *did* order to be sold—and the greater part of which belonging to the Pueblo of San Franciso, the Government did actually grant to settlers," &c. The question here recurs, what

right had the Government to dispose of these lands to settlers, if the Pueblo had the absolute title?

By referring to the map prefixed to Mr. Dwinelle's History, the Court will see what authority the Governors of California did exercise in the way of granting lands within the four square leagues now claimed as the absolute, inalienable, and indefeasable inheritance of the Pueblo of San Francisco. It will there be seen that nearly all the lands within such four square leagues had been granted out to Rancheros under the following designations, beginning at the north, to wit: Diaz, Guerrero, Noe, Bernal, Merced, De Haro, La Visitacion, Buri Buri, San Pedro; the claims to all of which, we believe, have been confirmed by the Land Commission and this Court. The granting of these ranchos strikes one as a strange kind of proceeding on the part of the governors of California, upon the supposition that the Pueblo of San Francisco was the owner of them; and it strikes one as still more strange that the authorities of the Pueblo never interposed any objection to the grant of these lands by the governors. The granting by the one, and the failure to object by the others, can be reconciled only upon the hypothesis that both well knew that the Pueblo had no claim, right, title or interest in the lands granted.

It is unnecessary to say anything more of the *suertes*, and the *solares*, than that they were small parcels of land, which the authorities of Pueblos had the right to make grants of, on behalf of, and as agents for the Government to actual inhabitants who petitioned for

them for the purposes of building and cultivation. These lots, when thus granted, became severed from the public domain, and reduced to private proprietorship; and this was the only method by which land could be claimed to be severed from the public domain; at least, until after lands had been specially assigned to the Pueblo by the Government in due form of law.

It is only under the view above taken of the rights of Pueblos, that the Decree of the Cortez of Spain of the Fourth of January, 1813, can be reconciled with law or with vested rights. This Decree is given, in translation, in the Addenda to Mr. Dwinelle's History, commencing page 20, No. XI, and the preamble and the first section are as follows:

"The Cortes, general and extraordinary, considering that the reduction of common lands (terrenos communes) to *private property* is one of the measures most imperiously demanded by the welfare of the Pueblos, and the improvement of agriculture and industry, and wishing, at the same time, to derive *from this class of lands aid to relieve the public necessities, a reward to the worthy defenders of the coountry, and relief to the citizens not proprietors*, decree:

"1. All *vacant* lands (*baldios*) are lands belonging to the Royal patrimony, (*realengos*) and lands the revenue whereof goes to the use of the pueblo governments (*propios y arbitrios*), wooded or otherwise, as well in the Peninsula and adjacent islands as in the provinces beyond the sea, except the necessary suburbs (*ejidos*) of the Pueblos, *shall be reduced to private property;* pro-

vided, however, that in disposing of lands, the revenue whereof goes to the use of the pueblo governments, (*propios y arbitrios*) the yearly revenue derived therefrom shall be supplied by the most appropriate means to be proposed by the respective provincial deputations, and approved by the Cortes."

It thus appears that the Cortes had no hesitation in disposing of what are called pueblo lands, with the same supreme power and control as of any other property unquestionably belonging, in absolute proprietorship, to the Government. And yet the laws of Spain were as tender in the encroachment on vested rights as the laws of our own or of any other country.

It is sometimes claimed that Law 6 of Title V of Book iv of *Leyes de las Indias*, gives to every Pueblo the quantity of four leagues of land. That law, however, applies only to that class of cases in which some person undertook, by contract, to settle with thirty heads of families in some uninhabited district of country. (*See this law in Addenda to Dwinelle's History, page* 1.)

It has also been claimed, that Law 10 of the same title and Book, is conclusive proof that the Pueblo of San Francisco was the owner of four square leagues. But this law simply declares that the same quantity of land, as had been before mentioned in the same title, *might be* granted to Pueblos. As this law is of some importance in the determination of the question now under discussion, we will give the original, as well as the translation, as they are found in the Addenda to Mr. Dwinelle's History, p. 2.

"Ley X. *Qui no haviendo pobladar particular, sino vecinios casados, se les conceda el poblar, como no sean menos de diez.*"

Quando algunas personas particulares se concordaren en hacer nueva problacion, y huviere numero de hombres casados para el efecto, se les dē licencia, con que no sean menos de diez casados, y deseles termino y territorio al respeto de lo que esta dicho, y les concedemos facultad para elegir entre si mismos Alcaldes ordinarios, y oficires del Concejo annales.

TRANSLATION, AS GIVEN BY MR. DWINELLE.

"Law X. If there should be no private contractor for a settlement, but only individual citizens who are married men, *let them have leave* to found a settlement; provided, they are not less than ten."

When private individuals shall agree to form a new settlement, and for that purpose there shall be a number of married men, *let leave be granted to them;* provided they be not fewer than ten married men; *let there be given them* extent of land and territory according to what has been heretofore provided, (al respecto à lo que està dicho) and we grant them power to elect among themselves Alcaldes with the usual jurisdiction, and annual officers of the council."

The first question is, whether this translation furnishes the exact meaning of the original.

In the first place, it will be observed in the syllabus of the law that the words which are translated "let them have leave," etc., are, in the orignal, "*se les conceda*,"

etc. Now, the verb *conceda* is in the subjunctive mood; and the strictly accurate translation is, as we contend, "leave may be granted to them," etc. The meaning is *permissive*, instead of *imperative*.

So also in the first clause of the body of the law, the phrase above translated "let leave be granted to them," is, in the original, "*se les dē licencia*." Here, again, we find the subjunctive mood used in the original, while the translation is in the imperative. According to our notions, this phrase ought to be translated "leave may be granted to them," instead of "let leave be granted to them."

Further, in the second clause of the text of the law the phrase in the translation "let there be given them extent of land," etc., is, in the original, "*y deseles termino*," etc. Here, also, the verb is in the subjunctive, and we claim that the rendering into English ought to be, "there *may* be given to them an extent of land," etc. In all these instances, the verbs in the original are in the subjunctive, and imply *permission*, instead of being in the imperative, and thereby signifying *command*. We are aware that the subjunctive is sometimes used to express the idea of command. The question here is, in which sense is it to be taken?

It is apparent that the law contemplates that something is to be done by some subordinate authority or officer, in order to carry it into execution. Land *may* be, or is to be, granted. This implies action on the part of some person or body by whom the grant is to be made. Granting land presupposes the formula of

an *espediente*, and the location, and demarcation, of the premises granted. The intervention of some officer, acting according to prescribed forms, is absolutely essential. Does this law contemplate that such officer should exercise any discretion, either in the quantity of land granted, or in respect to the persons to whom the grant may be made? Or is the law imperative that, when ten married men should present themselves before the officer, and intimate their desire to establish a Pueblo, such officer *must* proceed forthwith to assign to them four square leagues? Has he no power to inquire into their qualifications, moral and religious, their means, their nationality, or is he limited solely to the inquiry whether they are married men? Must he locate the land just where these ten men point out? Must he run the boundaries as they direct, or has he a discretion in the matter? We claim that the proper officer, to whom application should be made for the establishment of a Pueblo—who, in California, would have been the Governor and the Territorial Deputation, through the medium of the Sub-Prefect and Prefect—were not only entitled, but that it was their duty, to exercise their judgment in the premises, whether the application should be granted or not—whether any, and what lands, and for what purpose, whether for *propios* or *ejidos*, or *dehesas*, should be granted to the new Pueblo —what the extent of such lands should be—in what direction they should be marked off—and whether the *termino municipal* should embrace four square leagues, or a less quantity? All these matters lay in the dis-

cretion of the officer or body to whom was committed the execution of the law under consideration. But, according to the theory of our opponents, all that was necessary for the establishment of a Pueblo was, that ten married men should unite together, and resolve themselves into a corporate body; and then they, at once, became the owners in absolute property of four square leagues, wherever they chose to locate it, and in whatsoever direction they saw fit to run out its boundaries.

We will now subjoin a translation of Law X, which, in our opinion, more accurately expresses the legal meaning, than the translation above quoted:

[TRANSLATION OF LAW X.]

"LAW X. If there should be no private contractor for a settlement, but only individual citizens, who are married men, *permission may be given to them* (*si les conceda*) to form a settlement, provided they are not less than ten.

"When certain private individuals shall agree to make (*hacer*) a new settlement, and for that purpose there shall be a number of married men, *license* (*or leave*) *may be given to them*, (*si le dē licencia*) provided they be not fewer than ten married men, and an extent of land and territory *may be given to them*, (*dēseles*) according to what has been heretofore provided, and we grant them power to elect among themselves Alcaldes with the usual jurisdiction and annual officers of the Council."

This is language addressed by a superior to an inferior officer or authority, by which the latter is manifestly required to exercise a discretion in carrying the law into execution.

Nor is there anything adverse to this view to be found in the Regulations of Don Felipe De Neve for the government of the province of California, dated June 1, 1779, and approved by Royal Order on the 24th of October, 1781. (See a translation of this Regulation in Addenda to Dwinelle's History, commencing on page 3.)

By Section 4: "The house lots to be granted to the new pobladores *are to be designated by Government* (that is, by the Superior Political Chief) *in the situations and of the extent, corresponding to the locality*, on which the new Pueblos are to be established," &c. The supervising and controlling hand of the Government was thus felt in designating the house lots for the inhabitants, in ascertaining their respective situations, and in determining their extent. This does not look much like the manifestation of an intention on the part of the Government to vest an absolute title in the new Pueblos.

Section 5 of the same Regulations requires as many lots to be reserved for the use of the King as might be considered necessary; which reservation was undoubtedly to be made by the officer to whom was intrusted the duty of marking the demarcation of the municipal boundary and of the propios. Such reservation was not made from any actual grant, as might be

implied, but was intended simply as a withdrawal of the lands reserved from the power of the authorities of the Pueblo to lease, or to appropriate to the use of settlers.

Section 8 authorizes the "common privilege of the water and pasturage, fire-wood and timbers of the common forest and pasture lands, *to be designated according to law to each new Pueblo*," &c. But *until such designation was made*, the inhabitants of the Pueblo had no greater privileges in the respects above mentioned, than any other subjects of the king. Has it ever been shown that such privileges were *designated* for the Pueblo of San Francisco? Never. Not the least reason exists for supposing such a thing. It is utterly inconsistent with all that is known of the early condition of the district now called San Francisco. And here, by way of parenthesis, we will take the opportunity to suggest that previous to the year 1846, when the Americans took possession, there were three things in this neighborhood, which bore the name of San Francisco: 1st, The *Pueblo* of San Francisco, which, as hereinbefore mentioned, extended over a district of country equal in extent to two or three counties, and the authorities of which exercised a civil jurisdiction, analogous to that of a Board of Supervisors, over the entire district. 2d, The *Presidio* of San Francisco, situated about two miles west of the *Landing;* at which were stationed the military forces for the protection of the district. 3d, The *Mission* of San Francisco, located about two miles south of the *Landing*, and about three miles in

a direct line from the Presidio, being a religious establishment, consisting of a Priest and a few Indian neophytes. The particular spot which constituted the nucleus around which the present City of San Francisco has grown up, was called the *Landing* or the *Port of Yerba Buena*, and did not, on the 7th day of July, 1846, or ever before that date, contain ten married men, the heads of families.

To return from this digression. There is still another matter worthy of consideration in Law X, of which we have been treating. The preceding Law VI of the same Title had made provision for the formation of a settlement *by some person who would undertake by contract to settle it.* Law X then provides for a case in which "private individuals shall agree to form a new settlement," &c. The Law, thus, contemplates an *agreement* to be entered into by such private persons, as the very basis of the whole arrangement. Until, then, a foundation is laid by such an agreement on the part of the private individuals, no commencement is made for the operation of the law.

Great reliance is placed by our opponents on what is called the Plan of Pitic. (*This document will also be found in the Addenda to Mr. Dwinelle's History, commencing at page* 11.) We have never yet been able to learn how it happens that this Plan of Pitic—a plan devised specially for the organization of new settlements in the Province of Sonora—can have such a controlling influence over the affairs of California as has been claimed for it. It purports, in its title, to be:

"Instructions approved by His Majesty, and made for the establishing of the new town of Pitic, in the *Province of Sonora*, ordered to be adopted by the other new projected settlements (*Poblaciones*) and by those that may be establisbed *in the district of this General Commandancia*."

There is no more reason for supposing that the *Commandancia* there referred to embraced California within its jurisdiction, than there is for supposing that California was included within the limits of the Province of Sonora. But be this as it may, the "Instructions" teach no doctrine opposed to that advocated by us. It is manifest from the very first section that no new settlement could be formed, or, when formed, could acquire any rights, either political or proprietory, without complying with a fixed and prescribed routine. The last clause of the section declares that when the land, province and place, in which a new settlement was to be made, had been chosen, the *Governor* in whose district it might be, *should determine* whether it should be a city, town or village, and that, *in conformity with what he should decide*, the council, government, and officers should be constituted, and that the Governor in the execution of his powers, *should bear in mind the extent of the place* selected and the advantages offered by its lands, and *might* declare the new settlement to be a town (*Pueblo*)—thus committing to the Governor a supervisory control; not only over the creation and designation of the new settlement, but over its *extent* and organization.

The second section of the "Instructions" declares that there *may be* granted to the town in question four square leagues of territory in a square or in length. By whom, *may be* granted? By the Governor, of course. But the Governor may, by these very terms, exercise a discretion. The law does not say to the Governor, "You *shall* grant," &c. Nor does it say: In case you deem the applicants worthy of favor, you *shall* grant to them four square leagues, but you *may* grant to them an extent of territory *not exceeding* four square leagues. The question, then, is, can a settlement claim the "privileges of a city," town or village, under these "Instructions," without the Governor, or some other proper authority, granting such privileges? Can it lay claim to the ownership of any land, unless the Governor or other authority shall sanction the appropriation? Has it a title to four square leagues, until the Governor has declared his will that it shall have four square leagues? If the Governor should concede to it only one or two square leagues, is it irresistibly and irrevocably vested with the full quantity of four square leagues? It would seem that only one answer can be given to these questions.

It is apparent from the subsequent sections of these "Instructions," without going into a tedious analysis of each one, that, in the forming, laying out, and organization of a Spanish or Mexican Pueblo, village, city or town, not a single step could be taken without the express consent and direction of a supervising and controlling power. They had no privileges whatever with-

out an actual concession. A collection of people possessed no more than the *possibility* of privileges, until privileges were positively conferred upon them. And such we know to be a characteristic trait of the Governments which have grown up under the civil law, as distinguished from those which have come into existence under the less intermeddling genius of the common law system. Under the former, scarcely can a bridge be constructed, or a road laid out, in the most remote province, without license first obtained from some central and superintending authority: much less, without such license, could a few individuals, by associating together, acquire an indefeasible title to four square leagues of the national domain, wherever they chose to locate it, without even asking "by your leave" of the Government. So wild an idea never entered into the mind of a Spanish or Mexican tribunal, and can never obtain the sanction of this Court.

We have already dwelt too long on this question of a Pueblo becoming the absolute owner of four square leagues solely from the circumstance of its being recognized as having the political and civil jurisdiction generally pertaining to that species of territorial division of a Mexican Department called a Pueblo. And we here leave this branch of the subject with the further remark that all other laws and ordinances, instructions, regulations or decrees, which have been, or which may be, cited as bearing on the question under discussion, are subject to the same general course of analysis and reasoning which we have hereinbefore adopted.

And the conclusion on this particular head is, that, as no municipal boundaries were ever marked out for the Pueblo of San Francisco; as no *propios* were ever assigned to it; as no *ejidos* or *dehesas* were ever required for its use, or even thought of by the old inhabitants; as no application was ever made for or on behalf of the Pueblo for the assignment of either municipal bounds, or *propios*, or *ejidos*, or *dehesas*, and no *espediente* ever drawn up for the purposes above mentioned; we may safely conclude that the idea of "Pueblo lands" is but a myth, so far as respects any title of the Pueblo in such lands. The Pueblo had the *capacity* to take, and that was all.

No other or different inference can be drawn from the facts as stated by the counsel for the plaintiff in his brief. He says, (*pp.* 12 *and* 13 *of Brief*) after referring to the early settlement of California:

"In each settlement there was to be founded a Presido for its protection, and a Mission to collect together and civilize the natives; the Presidio was under the command of a Military Officer, and the Mission under charge of a lay Missionary; *both were Government officers. These settlements were intended to be towns or Pueblos. They were to be in charge of the Missionaries for ten years and then secularized; that is, transferred to the government of the ordinary civil powers One of these towns thus founded was San Francisco, founded in* 1776. In 1834 it was SECULARIZED. An Ayuntamiento or town government was organized,

which went into office January 1, 1835, and from that time it continued under the civil power as a Pueblo."

This is, in few words, a correct representation of the Pueblo history of San Francisco. Down to 1834, the district was under the semi-military and semi-religious administration of the Presidio and the Mission —the territory itself being known by the descriptive name of Mission lands—the lands of one Mission including all the ungranted lands to the limits of another Mission. In 1834, the Mission of San Francisco was *secularized.* Now, what is the meaning and effect of this change? It was simply and solely a change of the mode of government. Thereafter, the same district of country was governed by an Ayuntamiento, with its Alcaldes, Rejidors, Sindicos, called a Pueblo, &c., instead of being governed as before by a Mission with its priests. But no other change was effected, much less in respect to property, except the transfer of the charge of the Mission property to the officers of the new Pueblo—such property consisting only of the Mission buildings with the land on which they stood, and such personal property as the Mission owned. The very manner in which the Pueblo of San Francisco sprung into existence out of the secularization of the old Mission, leads irresistibly to the conclusion that it could have acquired no proprietary interest in any part of the national domain.

The Counsel for the plaintiff says in his brief (p. 13): "The Board of Land Commissioners in making their decree in the city case, decided that San Francisco

was a Pueblo on the 7th day of July, 1846," &c. Granted. So it will be conceded that San Francisco is a city. And it no more follows from the fact, that San Francisco was once a Pueblo, that it was the owner of a foot of land, than it follows that, because it is now a city, it must necessarily own all the lands within the city bounds.

The Counsel places great reliance on the decision of the Supreme Court of this State in the case of *Hart* v. *Burnett.* (15 Cal. 616). All that this case decided, was simply that the city of San Francisco had not such a title or interest in the lands within its limits, that they could be sold under an execution against the city. It is true that the Judge, who delivered the opinion in that case, enters into an elaborate discussion, which would answer almost as well for any other case as for the particular point then before the Court, in order to prove that the old Mexican Pueblo of San Francisco, had some interest of some indefinite character in an extent of territory equal to four square leagues. But the conclusion is arrived at, even in that opinion, that the Pueblo had not an absolute title—a title in fee—but some kind of a title *in trust* for the inhabitants in general. We do not see how that opinion—much less the decision itself—helps the plaintiff's case. The plaintiff claims that the Pueblo had an absolute title in fee—that decision, as well as the opinion, holds that it had not.

The Counsel for the plaintiff quotes largely from the opinion in his brief; as for instance, on p. 13, the fol-

lowing: "San Francisco was at the date of the conquest and cession of California, and long prior to that time, a Pueblo, *entitled to and possessing all the rights which the law conferred upon such municipal organization.*" Who doubts this? It is but the expression of the common truism, that every corporation, or civil division of a country, *is entitled to and possesses all the rights which the law confers upon such organization.* The question, however, still remains, what those rights are, and whether the law actually confers the rights claimed by the plaintiff.

The Counsel again quotes from the Novissima Recopilacion, Lib. VII, Tit. 16, Law 1, as follows (p. 14 of Brief):

"The laws of Spain fully recognize *the right* of cities, towns and villages *to acquire and dispose of* real estate, subject to the royal regulations which were made from time to time for their government. And *when once acquired*, neither the king nor his officers could take away or grant to others any of those municipal lands," &c. So in the United States, the right is recognized in cities, villages, towns and counties *to acquire and dispose of real estate, subject to the regulations of law.* But it would be a strange inference that, therefore, each county, town, village and city, by the simple fact of its organization as such, became the owner of any lands within its boundaries.

We might in the same way pass in review all the quotations of the Counsel from *Hart* v. *Burnett*, and from *Cohas* v. *Raesin*, and from *Payne* v. *Treadwell;* but

they amount to no more than assertions without proof, or inferences without premises, such as—"the Pueblo *was* the owner of lands"—or "was *entitled to* lands"—or "*to acquire* lands"—or "a right or title *seems* to have vested," &c.—or "that the power of the Pueblo over such lands *resulted*," &c.—or "that the Pueblo was vested with *some* title," &c.—or, "it would *seem* from these definitions," &c.—or "that the domain of the Pueblo was certain because "*id certum est quod certum reddi potest*," &c., &c., &c. The general tenor of the reasoning which we have adopted, applies to the quotations not specially noticed, with the same force as to those to which we have particularly addressed them.

The Counsel seems to place some reliance on the case of *New Orleans* v. *United States* (10 Pet. 662). But the facts of that case are so totally different from those of the case at bar, that any remarks which the Court made in that case as applicable to the facts then before them, can have no weight in the decision of the present case.

From the review which has been taken, we think it will not be assuming too much to deduce the conclusion, that the Pueblo of San Francisco did not acquire the absolute, unqualified, unconditional title—the title in fee—to any lands whatever, or wherever lying and being, by virtue of any particular grant from, or any special or general law of, the Spanish or Mexican government; that if it derived any right or title from Spain or Mexico, it was at the best but an imperfect, inchoate, merely equitable interest; that it was,

in truth, nothing more than a capacity to take—a claim on the Government to have lands, of such nature and quality, in such location, and to such extent, not exceeding four square leagues, assigned and set off to it, as to the government should seem proper—and that, until lands were thus definitely assigned and measured off, and a formal *espediente* thereof made up and passed through all the proper channels, there was no power whatever in the Pueblo over lands, except the bare, naked authority committed to the Ayuntamiento, or Alcaldes, or Justices of the Peace, as the agents of the Government, and on its behalf, to make grants of small lots or pieces of land to inhabitants who applied for them for the purpose of building and cultivation on a small scale.

Consequently, when California was transferred to the United States, no greater obligation was imposed on the American Government than had rested on the Mexican—and the latter was what is called in the language of writers on law, an *imperfect* obligation. "The obligation to which the United States thus succeeded, holds this Court in *Beard et al.* v. *Federy*, 3 Wallace, "was of course *political* in its character, and to be discharged *in such manner and on such terms* as they might judge expedient." Again it says, in the same case, that there may have been an obligation on the Government "to complete what thus remained imperfect;" and that "by the Act of March 3, 1851, the Government has declared the conditions under which it will discharge its political obligations to Mexican grantees."

With how much more force does this language apply to the imperfect and indefinite claims of the Pueblo of San Francisco, than to a case in which a grant, though not absolute and unconditional, was yet proved to have been actually made.

The obligation resting on the United States being thus merely political, it could have been discharged either by a direct Act of Congress, as was the case in many instances from Louisiana and Missouri, or by reference to the courts or to a Commission. The last course was preferred; and by the Act of March 3, 1851, establishing the Board of California Land Commissioners, the Government designated the method by which it had resolved to discharge this political obligation. And this brings us to the consideration of that Act:

ACT OF CONGRESS OF MARCH 3, 1851.

Having seen that the Pueblo of San Francisco had no title—at least, not an absolute and indefeasible title—that no lands within its limits had been severed from the national domain, except those fifty or hundred vara lots in the immediate vicinity of the Plaza, very few in number, and not to exceed, at the utmost, more than twenty or twenty-five, which had been granted by the Alcaldes of the Ayuntamiento or Justices of the Peace, as the agents of the General Government, to persons who had petitioned therefor, for purposes of building. We come next to the Act of Congress of March 3, 1851.

In the first place, let us refer for a moment to the condition of the towns or villages of California at the time that Act was passed. It must be admitted that Congress had but an indefinite conception of the precise character of the Presidios, Missions, towns, villages or Pueblos, which were supposed to be interspersed here and there over this wide extent of country. But Congress knew that there were a few settlements, previous to the 7th day of July, 1846, two or three of which, as, for instance, Los Angeles and Monterey, were designated by the Spanish term Pueblos; and that grants of small parcels or lots of land had been made, through what authority was but ill discerned, by the officers charged with the administration of the affairs of these Pueblos, to inhabitants who had solicited them for building lots. And Congress was also aware that, since the cession of the territory, and the immense influx of Americans, who had poured into it, villages had grown up on lands which had been granted for ranches by the Mexican Government to Mexican citizens, prior to the cession, and that numerous persons had become the *bona fide* possessors of small lots by purchase from such grantees.

Bearing this brief sketch of the condition of the country in view, it becomes manifest that the sole object of the 14th section of the Act of March, 3, 1851, was to protect the small lot-holders and them alone. The object of the Act, as set forth in the title—"to ascertain and settle private land claims"—was not deviated from in the 14th section. And it must be borne in

mind that all the provisions of the Act relate back, and apply only, to the condition of the country on and prior to the 7th day of July, 1846. The only grants or claims, which it was the intention of the Act to protect, whether of large ranches or of small lots, in the towns, villages or Pueblos, were such as existed on and prior to the said 7th day of July. For none of the provisions of the Act have any reference to matters springing up after the acquisition of the country. It is only claims which deduce their origin from some authority under the Mexican government, that come within the purview of the Act. Nor has the Act, in any of its provisions, the least reference to the lands which were, at the time of its passage, the undisputed property of the United States. There must be shown to be an interest or claim adverse to the title of the United States, before the title to any tract of land could be brought before the Commission, established by the Act. It was to settle the claims of individuals adverse to the general title of the United States, that the investigating Commission was created; and the burden of proof that any particular tract was private property and not part of the public domain, rested upon the party setting up the claim—the legal presumption being that all lands form part of the public domain until the contrary be proved.

The 8th section of the Act, therefore, makes it the duty of every person having claims to lands, to present the same to the Commissioners for investigation, together with the evidence in support thereof; and the Com-

missioners are authorized to take testimony in relation thereto. Under this portion of the law, each claimant is required to make out his own title, without reference to any similar claim; and the testimony and evidence in relation to each must be complete in itself. Had the general provisions of the 8th section been left without qualification or restriction, every holder of a town lot in California would have been compelled to file his own separate claim, and to make proof in his own several case, of all the facts connected with the establishment of the town, and independent of the proof in all similar claims, to establish the power of the authorities of the town to make grants, and the fact of his particular individual grant having been actually made to him by competent authority. This would have been highly inconvenient and troublesome, very expensive and wholly unnecessary; and to avoid this and simplify the proceedings was the object of the 14th section. The municipal authorities being, in all such cases, the immediate nominal grantors, the validity of the claims of the various lot-holders depended upon the right which such authorities held under the Mexican government, and in conformity with the laws thereof, to make such grants. The claims, therefore, to the lots in each several town, village or Pueblo, sprung from the same common source, and depended upon the same general principle; and all the grants in any given instance, being subject to the question of power or right in the authorities to grant, could well be considered together as one case. Hence, Congress deemed it best in all such

cases, that the claims should be presented by, and in the name of the authorities, and not by the grantees individually and separately for each lot granted. For these reasons, it was declared in the 14th section, that the general requirements of the 8th section should not extend to "any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, town, or village lot, which city, town or village existed on the 7th day of July, 1846, but the claim for the same shall be presented by the corporate authorities of said town; or where the land on which the said city, town, or village is situated was originally granted to an individual the claim shall be presented by or in the name of such individual," &c.

Had the section stopped here, its true intent and meaning would never have been brought into question. Thus far its sole object manifestly was, to exclude from the general operation of the 8th section, all lots held under grants from the corporate or lawful authorities of any city, town, &c., to whom the power to make such grants had been committed, as the administrators of the affairs of such city, town, &c., by and on behalf of, the Spanish or Mexican government, and in conformity with the laws thereof; also, all lots held under grants of any city, town or village, which existed as such on the 7th day of July, 1846; also, all lots held under grants of any city, town, or village, situated on land

which had been originally granted by the Spanish or Mexican government to an individual; and to provide that, in all such cases, instead of the individual lot owners being required to present their claims severally, the same should be presented by the corporate authorities of the town, or, where the town, &c., was situated upon a tract granted to an individual, then by and in the name of such individual. There is nothing thus far in this section, which will be pretended to grant any lands to any city, or town, or village—the sole object being to specify the manner in which, and the parties by whom, claims to town and city lots shall be presented to the Commissioners for their action.

But the section does not stop here. It goes on to provide that "the fact of the existence of said city, town, or village, on the 7th day of July, 1846, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim."

Prima facie evidence of a grant of what, and for what purpose? Does this mean *prima facie* evidence of a grant to the city, town, or village, by the Spanish or Mexican Government, of all the public lands, measured by the square league, which any city, town, or village that existed on the 7th day of July, 1846, might then, or may since that time, have thought proper to claim, as being comprehended within any limits over which its jurisdiction extended, or over which it chose to extend its jurisdiction? Manifestly not. But *prima facie* evidence of a grant to the city, town, or village, of such

lands, and only such lands, as the authorities of such city, town, or village had actually granted out to individual lot-holders—*prima facie* evidence, in other words, of the power of such city, town, or village authorities to make such small grants to lot-holders. Congress was providing a way for the protection of lot-holders in cities, towns, and villages, and for the presentation of their claims to the Commission; and a way for the protection and presentation of the claims of those only whose inchoate title dated back of the 7th day of July, 1846. It was no part or purpose of the bill to confirm such individual claims as had originated under the American Administration since the conquest of the country, and under the assumed powers of the American officers of the towns. Just as little was it any part of the scope of the bill to grant any portion of the public domain, to cities, towns, or villages, to their own use, or to confirm to them any lands to which they could not establish a title, in the same manner as other individual claimants, from the Spanish or Mexican Government.

It would seem to pass the comprehension of man to conceive how the circumstance of making the existence of a city, town, or village, on the 7th day of July, 1846, *prima facie* evidence only of a grant of the particular lands which the authorities of such city, town, or village may have granted to individuals, can be construed into the absolute conveyance by Congress to such city, town, or village, not only of those particular lands, but of all the public lands within its limits, however widely ex-

tended—when, too, there is the most satisfactory and conclusive evidence to show that, in point of fact, no grant was ever made. Had any such conveyance been designed by Congress by the passage of this Act, it would undoubtedly have been made clearly to appear in the concluding clause of the 14th section, which declares: "Where any city, town, or village shall be in existence *at the time of passing this Act*, the claim for the lands embraced within the limits of the same may be made by the corporate authorities of the said city, town, or village." That is: any city, town, or village, in existence at the time of the passage of the Act, may present before the Commission its claim to the ungranted land within its limits as city, town, or village, property; but, in that case, no especial favor is to be shown to it; no presumption is created by the law in its behalf; the grant under which it claims, and the limits thereof, must be established in the same manner in which individual claims under the 8th section are to be established; in fine, if it sets up a claim for its own benefit to any of the lands within its limits, it must establish that claim before the Commission, by making the same proof that individuals are required to make in order to establish their claims. In such case it can derive no aid from the *prima facie* clause of the section.

The views above taken of the Act of March 3, 1851, more particularly of the eighth and fourteenth sections, are sustained and confirmed by the contemporaneous construction given to it by its authors and framers. At page 427 of the Congressional Globe of the Session at

which the bill was passed, we find the following sketch of the debate:

"Mr. BENTON—I offer the following amendment as a "new section to come in after the 14th section:

"'All the ground within the limits of any town, city, "'or pueblo, or within the limits of the out lots, com- "'mon field lots, or commons, which was vacant, and "'not lawfully claimed by any individual at the date of "'the Treaty of Gaudaloupe Hidalgo, and which shall "'not be needed by the United States for military pur- "'poses, or for the erection of public buildings, shall be "'granted to said cities, towns, or pueblos respectively.'

"Mr. BENTON—This is a provision which has been con- "tained in most of the bills which have been drawn up "heretofore. It speaks for itself. It is to give the "scraps of public vacant ground which may be found "within the town limits to the town authorities. And "I can state to the Senate that we shall have to engage "in a great deal of trouble if we claim as United States "property these scraps of vacant ground. They have "been disposed of, in point of fact, by officers acting in "the name of the United States. General Kearney has "ceded many. Other Alcaldes, I know, have made "cessions of them. They are occupied by people; and "I should suppose that in the town of San Francisco "there are pieces of ground thus granted which are "worth immense sums, and which, in the end, the "United States will confirm to the possessors. If the "United States have to go through the process, it will "cause a great disturbance. Things will remain un-

"settled for a long time. Whereas, if this provision is "adopted, and all the vacant parts are given up to the "town authorities, it becomes a domestic question which "will be settled there, and settled, no doubt, in favor of "the actual possessor; and in that way peace and quiet "will be given to the country."

"Mr. BERRIEN [who from the Committee on the Ju- "diciary had reported the bill]—I have had occasion "to state to the Senate before that this is a bill, the ob- "ject of which is the *ascertainment of private claims.* "It is not a bill the design and intention of which is to "*confer titles, but to ascertain who is in possession of titles.* "That is the extent to which we can safely go, with the "information which we have upon this subject. Indi- "vidual Senators may believe themselves to be accu- "rately informed, and they may be so; but the great "body of the Senate certainly has not that extent of in- "formation which would enable them to decide what it "is proper for Congress to do in relation to very many "of these claims. We propose, therefore, to proceed "cautiously to put ourselves in a condition to comply "with the stipulations of the treaty, and by the aid of "these judicial tribunals and this board of commission- "ers, *to ascertain what is private property.* When this "is done, and when we have acquired information in "regard to claims peculiarly situated, as this is, then it "will be competent for Congress, by an Act, to confirm "them, and provide for their particular cases. In the "meantime, the safer course is to adhere to the provi-

"sions of the bill, which limits the Courts to ascertain-
"ing existing titles, and confirming them."

The proposed amendment was rejected. And does not the rejection, taken in connection with the remarks of Mr. Benton, its author, in support of it, and of Mr. Berrien in opposition, prove conclusively that Congress, in passing the Act, did not intend, either to convey to any city, town, or village, in California, a single foot of any land within its limits, which was the property of the United States, or to confirm any grants, which the authorities of any city, town or village had, since the conquest, undertaken to make to individuals, of lands, which became the property of the United States by the treaty of Guadaloupe Hidalgo; and which, therefore, said town authorities had no power to grant away?

The Senator from California, Mr. Gwinn, did, indeed, on two occasions, remark, in the progress of the debate, that, according to his "understanding" of it, the 14th Section "provided, in effect, that all town lots, out lots, farm lots and pasture lots shall be confirmed outright;" but that this was not the understanding of the Senate, is apparent from the proceedings quoted above.

On a previous day, (See Congressional Globe, same Session of Congress, page 108), Mr. Benton moved to strike out the 14th section, and insert the following amendment:

"That the rights, titles, and claims to town, city,
"Pueblo or village lots, common field lots, and com-
"mons in and adjoining and belonging to the several
"towns, cities, Pueblos or villages in California found-

"ed under the Spanish or Mexican government, which "lots have been inhabited, cultivated or possessed pre- "vious to the date of the treaty of Guadaloupe Hidal- "go, shall be and the same are hereby confirmed to the "inhabitants of the respective towns, villages, Pueblos "and cities according to their right or rights in com- "mon thereto," &c.

In the course of his remarks in support of this amendment, Mr. BENTON said: "We all know what "*prima facie* is. It is only a presumption, &c. It is "only *prima facie* evidence of a general fact, after "which, and under which, are to come forward all the "questions of ownership."

"Mr. BERRIEN [In opposition to the amendment]:

"Mr. President—I explained to the Senate, when "this subject was first taken up, after the Judiciary "Committee had reported, the grounds upon which this "section was founded. It was understood that grants "had been made to corporations of lands four leagues "in extent, with authority to grant to individuals, town "lots and pasture lots. The object of the provision "[the 14th Section] which it is proposed to strike out, "*is to relieve individual lot holders from the necessity of "presenting their claims by enabling the corporation to "present a general claim which shall come to the benefit "of all the lot holders.*"

"There were some cases in which cities, towns and "villages had been founded upon lands granted to in- "dividuals. In either case it is provided that the exis- "tence of the city, town or village, at the time the

"American flag was hoisted there, shall be considered as "*prima facie* evidence of a grant to the corporation, "or to the individual from whom the lot holders deriv- "ed title. It is obvious the provision that this should "be only *prima facie* evidence ought to be introduced "into the bill; for, if there be a better title in an older "grant to an individual, who should rebut this *prima* "*facie* presumption of title, that presumption ought not "to hold. This is the extent to which the *prima facie* "goes."

At a still earlier stage of the discussion, Mr. BERRIEN, in explanation of the views of the Committee in drafting the bill, speaking of the 14th Section, said:

"The next provision of the bill regards town lots. "In the discussion which was had before the Senate "the other day, we were informed that there were "cities and towns in California to which lands had been "granted by the Spanish and Mexican governments; "and the corporate authorities of these towns were au- "thorized to issue to individuals grants for town lots, "building lots, and for farm and pasture lots. The "Judiciary Committee believed that it would not be "proper to subject each individual lot holder to the "necessity of restoring his claim to the town, farm or "pasture lot, but, deriving the title from the corporate "authority, that it will be sufficient if the claim was "presented in the name of the corporate authorities.

"It was further found that there are certain cities, "towns, and villages in California, the land constituting "the site of which had not been granted by the Span-

"ish or Mexican government, but by an individual who "has been the founder of the city, town, or village, or "who has conveyed to individuals the lots which they "hold and upon which property of vast value has been "erected. It seemed to the Committee that this also "required to be provided for, and therefore, the object "of the 14th section of the bill is to declare that in this "case it will be sufficient for the claim to be presented "by the corporate authority of the city, town, or village, "or by the individual whom the title was derived from, "are individuals under whom the lot holders hold. "*And in order to give security to those lot-holders, who* "*hold upon the faith of these grants from the Mexican* "*government*, or, relying upon the individual title, "under which they hold, have erected in many cases "valuable and extensive buildings, the bill provides "that the existence of such city, town, or village on the "7th day of July, 1846. shall be *prima facie* evidence "of a grant to such corporation or to the individual "under whom the said lot-holders claim."

It appears to us that this discussion in the Senate, in which body the bill originated, very clearly explains the objects and purposes of the fourteenth section. And such explanation consists with, and only with, the construction which we have already given to the section. "*In order to give security to those lot-holders* who hold "upon the faith of these grants from the Mexican Gov- "ernment," Mr. Berrien says that the clause was inserted which provides that "the existence of such city, town, "or village, on the 7th day of July, 1846, shall be *prima*

"*facie* evidence of a grant to such corporation," etc. Thus, the sole purpose of this fourteenth section was to provide an easy and expeditious mode by which individuals, to whom grants of lots had been made by the authorities of towns, cities, or villages, might secure themselves as against any claims of the United States; and this they were to effect through the corporate authorities of the city, town or village under which they derived title. To apply this reasoning to the City of San Francisco. The fourteenth section was intended to secure and protect, so far as against any claim of the United States, those individuals and their grantees, to whom grants of lots had been made by the Alcaldes or Ayuntamiento of the Pueblo of San Francisco, prior to the 7th day of July, 1846. And for this purpose, and to this extent alone, was the existence of the town on the 7th day of July, 1846, to be *prima facie* evidence of a grant to the town from the Spanish or Mexican Government. In other words, the United States say, by this fourteenth section, to the individuals to whom grants of lots had been made by the Alcaldes and Ayuntamiento of San Francisco, we confirm such lots to you, upon the sole condition of your proving, through the application made by the city on your behalf to the Commission, the existence of the city, town, or village under which you claim, on the 7th day of July, 1846; and on your making such proof, the Commission and Courts shall presume, for your protection, that a grant was made by the Mexican or Spanish Government to the Pueblo of San Francisco: we, however, reserve to our-

selves the right to rebut this presumption, or *prima facie* case if we see fit, and are able so to do. But nothing in the fourteenth section, or in any other part of the bill, places towns, cities, or villages, so far as regards their corporate rights or claims, in a better situation than individual claimants of ranches. If a town, city, or village laid claim to ownership in itself of any lands, there is nothing in the bill which excuses it from proving a grant to it from the former Government, in the same manner and by the same rules and order of proof in which all other private land claimants were required to establish their claims—that is, by proving an actual grant, either by patent or by some law, without the aid of presumptions or of being permitted to start with a *prima facie* case in their favor.

The whole course of the subsequent legislation of Congress, as well as of the State Legislature, and the action of the City of San Francisco, all indicate the pursuit of a course of conduct on the part of these bodies respectively utterly irreconcilable with the views of the plaintiff, but strictly in accordance with the construction we have above given to the Act of March 3, 1851.

By the subsequent legislation of Congress, we allude to the Acts of March 3, 1853, adopting the Act of Congress of 1844, by which all the lands within the chartered limits of the city were donated to the authorities of the city in trust for the respective occupants; to the Act of Congress confirming the so-called Van Ness Ordinance; and to several other Acts of Congress subsequent to the last named, the scope and

object of all which were, to surrender to the city for the use and benefit of the inhabitants, all claim of the United States to the four square leagues claimed by the city, saving and reserving therefrom such lands as had been before granted by the Spanish and Mexican governments, together with such pieces and parcels as should be needed for military reserves, or other public uses of the United States. These acts are inconsistent with the supposition, on the part of Congress, that the city was entitled to four square leagues, or any smaller quantity of land, by virtue of any right derived under the Spanish or Mexican government.

By the action on the part of the city above mentioned, we allude to the passage of the Van Ness Ordinance in compliance with the Act of Congress of March 3, 1853, and the Act of 1844, and the procurement of the enactment by Congress of the various other Acts giving to the city the ungranted and unreserved lands within four square leagues. This action of the city manifests an utter lack of confidence in the asserted right of the Pueblo to the four square leagues under the Spanish or Mexican government.

And by the legislation of the State Legislature, we refer to the Act of 1858, confirming the Van Ness Ordinance.

An attentive and critical examination of the above-mentioned proceedings of Congress, of the State Legislature, and of the authorities of the city of San Francisco, a more particular notice of which than is above given would occupy too much time and space here, will convince the Court that neither the one nor

the other of these bodies ever entertained the idea that the Pueblo title, to the extent claimed by the plaintiff, was anything more than the "baseless fabric of a vision," which answered its purpose well enough for the time being, but in which it would be unsafe to take up one's abode permanently.

It has been our object, thus far, to show that neither the Pueblo of San Francisco, under the Spanish or Mexican laws, nor the city of San Francisco, under the Act of Congress of March 3, 1851, had any right, title, or interest in or to any lands whatever, as against the claim of the United States, except only so far as was sufficient to protect the lot-holders to whom grants had been made by the authorities of the Pueblo prior to the seventh day of July, 1846. All the lands within the four square leagues since claimed by the city, which remained ungranted by the authorities of the Pueblo on the day last mentioned, passed to the United States, excepting, however, in addition, those large ranches and other tracts within the same limits which had been conceded to rancheros by the Spanish or Mexican government. And, consequently, as the lot in controversy in this suit had not been granted either by the Spanish or Mexican government, or by the authorities of the Pueblo, prior to the said seventh day of July, it was transferred, with the rest of the public lands in California, to the United States, by the treaty of Guadaloupe Hidalgo, and became thenceforth annexed to the public domain of the United States.

We will conclude what we have to say on this branch of the subject in the language of the Supreme

Court of this State in *Hart* v. *Burnett*, (15 Cal.) quoted by the plaintiff's counsel, on page 29 of his brief:

"We have examined the law of 1851 with due care "and attention, *but we have not been able to find in it* "*any provision which confers upon San Francisco any* "*title to land.* The fourteenth section of that law "raises the presumption that any city, town, or village "of California which existed on the seventh day of "July, 1846, had a grant of land. *But what kind of a* "*grant?*" This question we have answered above.

But, further: So far as the Courts of the United States had acted under this statute down to the date of the trial, the land in controversy had been reserved from the operation of the decree of confirmation. If, notwithstanding the appeal therefrom, the decree of the Circuit Court still remains effective, then this lot of land is reserved by force of that decree. If it is not effective, then the title of the Pueblo, whatever it be, still continues inchoate and imperfect, and not a sufficient basis for an action of ejectment. And if the affirmance of the decree of the Circuit Court in this Court is to be taken into consideration, then, also, this lot remains still reserved to the Government. But, independent of these considerations, a tract of land, including this lot, was actually, and in fact, reserved by the Government prior to the passage of this Act of March 3, 1851, as will be shown under our next head.

A RESERVATION WAS MADE BY THE PRESIDENT OF THE LOT IN CONTROVERSY, WITH OTHER LANDS.

It is conceded by the counsel for the plaintiff, that,

on the thirty-first day of December, 1851, Mr. Fillmore, then President, made an order in pursuance of the recommendation of Secretary Conrad, setting off two small reservations, "one of which includes the land in controversy." (See *Brief of Plaintiff, page* 4.)

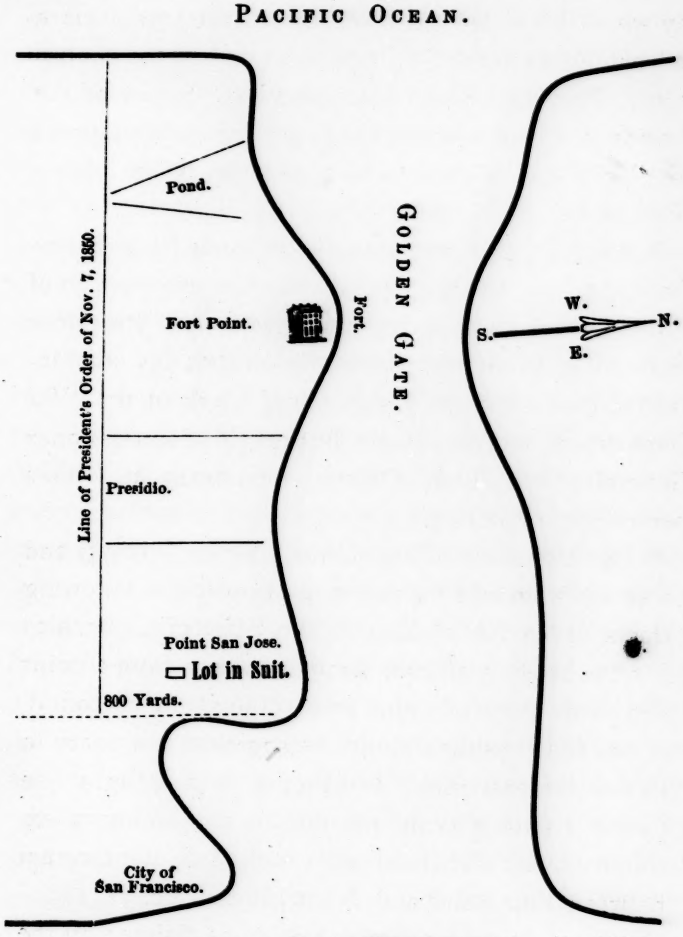
Now, if this lot was part of the public lands on the day when this order was made, as we have hereinbefore endeavored to establish, it puts an end to the controversy. For, we do not understand the power of the President to make reservations for military purposes out of the *public* lands, to be questioned by the plaintiff's counsel.

But, in fact, this reservation was made long before December 31, 1851. As early as the seventh day of November, 1850, an order was made by the President of the United States, which was on that day communicated by Geo. T. M. Davis, Chief Clerk of the War Department, to Hon. Justin Butterfield, Commissioner General of the Land Office, which reads as follows (see *page* 9, *of record*):

"The President of the United States exempts and "reserves from sale for public purposes, the following "tracts or parcels of land in the State of California: "I. In the Bay of San Francisco; 1st, from a point "800 yards south of Point José to the southern bound-"ary of the Presidio; along the southern boundary to "its western extremity; and thence in a straight line "to the Pacific Ocean, passing by the southern ex-"tremity of a Pond that has its outlet into the channel "between Fort Point and Point Lobos," &c.

Now, we do not understand it to be claimed by the

plaintiff's counsel that this reservation does not include the lot in controversy, provided the order be not void for indefiniteness of description. And as we can elucidate this objection best by means of a diagram of the situation of the land, we subjoin the following rude sketch:



It will be observed that the only defect in the description is that the starting point 800 yards south of Point José is not connected with the Point itself by a line drawn between the two. But we submit that the description is sufficiently definite. No one could misunderstand from the language of the order just what "tract of land" was intended to be reserved. At all events, it was sufficiently definite to put persons on inquiry, to warn them off from the whole tract embraced within a line running south from Point José to the starting point in the order, and the other lines in that order. The same nicety in description is not necessary in such an order as is required in a deed between individuals. But the above description would be sufficient even in a deed. This first reservation was made before the passage of the Act of March 3, 1851, and, consequently, cannot be affected by that Act, or by any of the proceedings had under it. At the date when this reservation was made, the Pueblo and city of San Francisco could have possessed, upon the most favorable view of their claims, nothing more than an equitable right, as against the United States, to the lands within the limits of the city, which the United States might satisfy by making compensation otherwise, as well as by giving up the land itself. We are here speaking upon the supposition not to be indulged in, that our preceding reasoning as to the Pueblo rights may be of no avail. Either of the orders of the President—the one of Nov. 7th, 1850, or the change in that order made on Dec. 31, 1851—

operated as a severance of the land mentioned therein from the public domain. Such land thereafter ceased to be a portion of the "public lands" of the United States.

The President's right to make such selections and reservations was not only conceded on the argument in the Circuit Court, but is established by the following authorities:

Wilcox v. *Jackson*, 13 Pet. 512.
United States v. *Chicago*, 7 How. 192–3.
United States v. *Gear*, 3 How. 132.
United States v. *Stone*, 2 Wall. 537.
2d Vol. of Opinions of Att'y Gen'ls, p. 207.
5 Ib. do. do. 578.
6 Ib. do. do. 571, 677, 157 *et seq.*
4 U. S. Stat. at Large, 420.
Statutes of 1863–4, pp. 333–4.

Even before the acquisition of California, the Point on which this lot is situated was a military site, and was called the "Battery of Yerba Buena." (See *Halleck's Report, Executive Documents*, 1 *Sess.* 31 *Congress, Vol.* 5, 1849–50, *p.* 131.) Such military sites were not capable of acquisition and settlement under the Mexican laws. They were always understood to be reserved from an actual grant. (See *Halleck's Rep. ubi supra; Mitchell* v. *United States*, 15 Pet. 86; *Hart* v. *Burnett*, 15 Cal. 543.) Even though military sites had not been reserved beforehand, the claim of the Pueblo

would be subservient to the right of the government to select such sites at any time afterwards. (See 5 *Colonization Law of Mexico of* 18 *Aug.* 1824, *in Halleck's Report ubi supra, p.* 140, 120–1, *of Ex. Doc.; also Act of Mexican Congress of* 1830.)

ACT OF MARCH 3, 1853.

It follows as a consequence from the last point, that the Act of March 3, 1853, has no effect on the question now before the Court. We have seen that the order of the President had severed the lot in controversy, together with other lands, from the "public lands" of the United States prior to the passage of this Act of March 3, 1853. It is not pretended that any portion of this Act, except the eighth section, has any influence on the case. It is by virtue of this eighth section, and by virtue of this alone, that the Van Ness Ordinance was passed, and it was in confirmation of the Van Ness Ordinance, that the Act of the State Legislature was passed in 1858, and, also, the Act of Congress confirmatory of the Van Ness Ordinance and of the Legislative Act. But neither the Van Ness Ordinance, nor the Acts confirmatory thereof, can extend beyond the authority of the eighth section of the Act of March 3, 1853, on which they are all founded. But this section embraces within its purview only "*public lands*, not mineral lands," &c., it commencing with the words, "That the *public lands*," &c. The tract embracing the lot in controversy had ceased to be *public land* prior to March 3, 1853, by

reason of the President's orders hereinbefore referred to. Consequently, the plaintiff can take nothing by the Act of March 3, 1853, nor by the Van Ness Ordinance, nor by the Act of the Legislature of 1858, nor by the Act of Congress confirming such Ordinance.

We believe that the foregoing reasoning covers the first nine points, as well as the eleventh and twelfth, (excepting a part of the eighth, which will be hereafter noticed) of the plaintiff's Brief, and we leave them here.

PLAINTIFF'S OBJECTION TO THE ADMISSIBILITY OF THE DECREE OF THE CIRCUIT COURT IN EVIDENCE.

The tenth point of the plaintiff's counsel is, that the decree of the Circuit Court of the United States in the case of the *United States* v. *The City of San Francisco*, was not admissible in evidence, an appeal having been taken therefrom, which destroyed its effect as evidence of title.

It will be recollected that the case referred to by the counsel has, since the trial of this cause in the Court below, been decided by this Court, and the judgment of the Court below affirmed. In respect to the effect of this decree of the Circuit Court as evidence, if it proved nothing, it could not have been material. And, not being material, it could have done the defendants no good, and the plaintiffs no harm. Consequently, even though, in strictness of law, this decree ought not to have been admitted in evidence,

yet, as it could have done neither good nor harm, the judgment will not be reversed on this ground.

The decree was, in fact, evidence in favor of the plaintiff, if it had any force at all as evidence. For, without this decree rendered in pursuance, and by virtue of, the power conferred by the Act of March 3, 1851, establishing the California Board of Land Commissioners, the plaintiff had not, as against the United States, the shadow of a claim. For, as we have seen, the land did not vest in the Pueblo by virtue of the laws of, or under a grant from, the Spanish or Mexican government; and, as no grant had been made by the authorities of the Pueblo of this lot to the plaintiff, or to any other person through whom he claims, this lot, therefore, with the rest of the lands, passed to the United States, and could have been severed from the public lands of the United States only by proceedings had under the Act of March 3, 1851, of which proceedings this decree formed one portion.

Besides, as the counsel says (*p.* 42 *of his Brief*): The defendant offered simply the decree, without giving the roll or record in evidence. And the counsel, in the same connection, justly remarks, a decree is *of no effect* unless there is some allegation to support it—a decree without that is a *mere nullity*. If, therefore, the decree, without the rest of the record, was, as the counsel declares and as we admit, *of no effect, and a mere nullity*, it could, of course, have done no injury to the cause of the plaintiff, nor have been of any benefit to the defense. And further, we submit, that the plaintiff

waived his objection to the admissibility of this decree by subsequently giving in evidence the petition of the city of San Francisco to the United States Board of Land Commissioners, which first presented the question that was finally adjudicated in the Circuit Court by this decree. The introduction in evidence of that petition rendered the decree admissible, in order to show what disposition had been made of such petition and the proceedings had thereunder.

The rest of the remarks of the counsel under this tenth point consist of objections to the matters contained in the decree of the Circuit Court, and principally to the fact that the reservations made by the President were excepted from the lands confirmed by the decree to the city. We think, however, that the plaintiff can hardly be permitted to review the merits of that decree in this collateral action.

The conclusion of the counsel's argument, however, if there were nothing else, entirely overthrows his objection. At the end of page 43 of his Brief, he says: "It (the decree) is evidence that such a decree was rendered; of the *rem ipsam; but it decides no rights, changes no status, determines nothing when offered in evidence to affect the title at issue in this cause;* IT IS OF NO MORE EFFECT THAN SO MUCH BLANK PAPER." Blank paper, if admitted in evidence, cannot help or hurt a cause.

We come, now, to the thirteenth and last point of the plaintiff's Brief, which we propose to consider briefly

in connection with that portion of the eighth point which we left unnoticed.

The sum and substance of the matters contained in these points is, that the defendant had no right to take forcible possession of the lot in controversy, and that the United States had not the right, in time of peace, to take possession, for warlike purposes, of the property of a citizen without just compensation.

The latter part of this proposition assumes, as its basis of fact, the very point on which this whole controversy hinges; that is, that the lot in controversy was the property of the plaintiff. It is said, (*page* 49, *Point XIII*) that "The United States cannot exercise military jurisdiction in any place within the body of the State, (except in time of war) unless the jurisdiction over such place is ceded to the Federal Government by the State Government."

But the United States is entitled to the use and enjoyment of its own property, the same as an individual proprietor. If the plaintiff was, as he claims, the owner of this lot of land, we should not pretend that there was any defense; but as the United States are the owners in absolute proprietorship, and the plaintiff is not, we say that the plaintiff has no cause of action: so that the whole dispute comes back to a question of ownership.

As to the other branch of the proposition, which is advanced as a part of the plaintiff's eighth point, the just solution of it depends upon the same question of ownership. If the plaintiff is the owner, then we

concede there is no defense—we confess that the defendant had no right to take even peaceable, much less forcible possession. But if the United States are the owners, an entirely different case is presented. The defendant connects his entry with the title of the United States. He stands in the same position in this action as the United States would occupy, were they the defendants of record. He justifies under them, and has the same rights which they have. Even if the entry were forcible, that constitutes no cause of action in ejectment, unless the plaintiff can prove himself the owner; and then, it is the ownership, and not the force, which gives the action. If the true owner of land takes possession by force, the person ousted, having no right, cannot maintain ejectment. In such case, the latter may be restored to possession, irrespective of an inquiry into title, by proceedings under the Statute of Forcible Entry and Detainer. It was because the common law gave no remedy in such a case, that this statute was originally passed; and it is because the common law has since never been construed to give such remedy, that the same Statute of Forcible Entry has its place on the statute books of all the States down to the present time. But it is elementary law, that ejectment cannot be maintained against one who has taken possession, having the right of entry. In point of fact, however, no actual force was used. The plaintiff voluntarily surrendered possession on the demand of Gen. McDowell, and the pic-

turesque description on page 40 of the counsel's Brief is but a little harmless external embellishment.

STATUTE OF LIMITATIONS.

The plaintiff has raised an objection to the defense growing out of the Statute of Limitations of this State. This is easily answered in few words. 1st, The statute does not, in any case, run as against the General Government. 2d, It could have no effect until it was shown, as a foundation for it to rest upon, that the land, in respect to which it is to be applied, had been severed from the mass of the public lands, had become the subject of private ownership, and had then again become the property of the United States. 3d, The force of the statute, as against the United States, is obviated by the first clause of the third section of the Act admitting California into the Union, which provides (see *Wood's Digest, p.* 43) as follows: "That the said State of California is admitted into the Union upon the express condition that the people of said State, *through their Legislature* or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass *no law* and do *no act* whereby the *title* of the United States to, and *right to dispose of*, the same shall be *impaired* or questioned." If the Statute of Limitations of this State were to be made applicable to such a case as the present, it would *interfere with the primary disposal of the public lands* by the Government, and would *impair the title* of the United States, and *their right to dispose of* such lands.

CONCLUSION.

In conclusion, we will barely remark, that, since the passage of the Acts of March 3, 1851 and March 3, 1853, Congress has enacted several special statutes having particular reference solely to the city of San Francisco. By these Acts, in connection with, and in addition to, the Acts of 1851 and 1853, the Government has expressed its precise will in regard both to the Pueblo and the city of San Francisco. It has not only most liberally performed the obligations which it assumed by the treaty with Mexico, but it has gone far beyond; although it has, in some of the Acts expressly, and in the others impliedly and as a consequence resulting from them, reserved to itself small "scraps" of land, as they are called by Mr. Benton, the present lot being among the number, for military sites and hospital and other similar purposes. This the government had a perfectly legal, equitable, and moral right to do. And so far as it has exercised this right, its action cannot be controlled by the judiciary. Whilst the Act of March 3, 1851, was a general Act applying to all cases, and the 8th section of the Act of March 3, 1853, applied to all towns, villages and cities, the other Acts to which we have referred, are not only later, but are special and specific statutes, referring to the precise subject matter of the confirmation of lands to San Francisco, and reserving from such confirmation certain lands, including the present lot. These special Acts, therefore, control. They express in the latest and most definite form

act July 1. 1864 - 13 Stat at large p 333. §5.
act Mch 8. 1866 - Stat at large p 4.

turesque description on page 40 of the counsel's Brief is but a little harmless external embellishment.

STATUTE OF LIMITATIONS.

The plaintiff has raised an objection to the defense growing out of the Statute of Limitations of this State. This is easily answered in few words. 1st, The statute does not, in any case, run as against the General Government. 2d, It could have no effect until it was shown, as a foundation for it to rest upon, that the land, in respect to which it is to be applied, had been severed from the mass of the public lands, had become the subject of private ownership, and had then again become the property of the United States. 3d, The force of the statute, as against the United States, is obviated by the first clause of the third section of the Act admitting California into the Union, which provides (see *Wood's Digest, p.* 43) as follows: "That the said State of California is admitted into the Union upon the express condition that the people of said State, *through their Legislature* or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass *no law* and do *no act* whereby the *title* of the United States to, and *right to dispose of*, the same shall be *impaired* or questioned." If the Statute of Limitations of this State were to be made applicable to such a case as the present, it would *interfere with the primary disposal of the public lands* by the Government, and would *impair the title* of the United States, and *their right to dispose of* such lands.

CONCLUSION.

In conclusion, we will barely remark, that, since the passage of the Acts of March 3, 1851 and March 3, 1853, Congress has enacted several special statutes having particular reference solely to the city of San Francisco. By these Acts, in connection with, and in addition to, the Acts of 1851 and 1853, the Government has expressed its precise will in regard both to the Pueblo and the city of San Francisco. It has not only most liberally performed the obligations which it assumed by the treaty with Mexico, but it has gone far beyond; although it has, in some of the Acts expressly, and in the others impliedly and as a consequence resulting from them, reserved to itself small "scraps" of land, as they are called by Mr. Benton, the present lot being among the number, for military sites and hospital and other similar purposes. This the government had a perfectly legal, equitable, and moral right to do. And so far as it has exercised this right, its action cannot be controlled by the judiciary. Whilst the Act of March 3, 1851, was a general Act applying to all cases, and the 8th section of the Act of March 3, 1853, applied to all towns, villages and cities, the other Acts to which we have referred, are not only later, but are special and specific statutes, referring to the precise subject matter of the confirmation of lands to San Francisco, and reserving from such confirmation certain lands, including the present lot. These special Acts, therefore, control. They express in the latest and most definite form

act July 1. 1864 - 13 Stat at large p 333, §5.
act Mch 8. 1866 - Stat at large p 4.

the will of the Government. They declare to what extent the Government considers its *political obligations* to be binding. They determine how far it will go, and what it will do, in discharge of these obligations. "And this," (says this Court in *Menard's Heirs* v. *Massey*, 8 How. 294), "the United States had a right to do, because having the plenary power of confirmation, they could annex such conditions to it as they chose."

These later Acts of Congress, in which the Government reservations are specially excepted from the grant of land by the United States to the city, necessarily supersede all previous Acts. They finally dispose of the matter. The Courts can no longer say what shall be done with the land, for the Acts of Congress passed *pendente lite*—during the pendency of the proceedings before the Commission and the District and Circuit Courts, ascertain and determine what shall be done. Congress might have repealed the Acts, by virtue of which the Commission and the Courts took jurisdiction, and thereby have superseded their action. The Courts cannot say that the lands reserved shall go into a different channel from that into which Congress has directed them; and Congress has expressly said that the city shall not have the reservations. Under such circumstances, what would be the duty of the Commissioner of the General Land Office? Would he not be controlled by the Acts of Congress? Would he, in defiance of the expressed will of the Government, undertake to issue a patent to the city, including the reservations? Would a patent thus issued be of any va-

lidity? Undoubtedly Congress might even now, before the issuing of the patent, repeal the Act of March 3, 1851; and all the proceedings had under it, would fall with it. The Courts would be powerless to exercise further jurisdiction. The last Act of Congress on the subject was passed since the decree of the Circuit Court, and is a substantial affirmance of that decree. And both the decree and the Act except the reservations from confirmation. We respectfully submit that the Government has finally disposed of the land claims of the city of San Francisco. But, leaving Acts of Congress out of view entirely, the *title* is in the Government, and must prevail until after final confirmation and *survey* and the issuing of a *patent*. The case is really settled by *Singleton* v. *Touchard*, 1 Black.

THE DEFENDANT IS IN POSSESSION AS AN OFFICER OF THE GOVERNMENT.

One point further: General McDowell is in charge of the lot in controversy, as an officer under orders of the Government. Individually he has no possession in law, any more than a hired servant has of the dwelling of his master. Could an action be maintained against the Collector of the Port to recover possession of the Custom House? Or against the Superintendent of the Mint, for that building? Custom House officers cannot be garnisheed for goods in their charge, nor the Superintendent of the Mint for the gold dust of a de-

the will of the Government. They declare to what extent the Government considers its *political obligations* to be binding. They determine how far it will go, and what it will do, in discharge of these obligations. "And this," (says this Court in *Menard's Heirs* v. *Massey*, 8 How. 294), "the United States had a right to do, because having the plenary power of confirmation, they could annex such conditions to it as they chose."

These later Acts of Congress, in which the Government reservations are specially excepted from the grant of land by the United States to the city, necessarily supersede all previous Acts. They finally dispose of the matter. The Courts can no longer say what shall be done with the land, for the Acts of Congress passed *pendente lite*—during the pendency of the proceedings before the Commission and the District and Circuit Courts, ascertain and determine what shall be done. Congress might have repealed the Acts, by virtue of which the Commission and the Courts took jurisdiction, and thereby have superseded their action. The Courts cannot say that the lands reserved shall go into a different channel from that into which Congress has directed them; and Congress has expressly said that the city shall not have the reservations. Under such circumstances, what would be the duty of the Commissioner of the General Land Office? Would he not be controlled by the Acts of Congress? Would he, in defiance of the expressed will of the Government, undertake to issue a patent to the city, including the reservations? Would a patent thus issued be of any va-

lidity? Undoubtedly Congress might even now, before the issuing of the patent, repeal the Act of March 3, 1851; and all the proceedings had under it, would fall with it. The Courts would be powerless to exercise further jurisdiction. The last Act of Congress on the subject was passed since the decree of the Circuit Court, and is a substantial affirmance of that decree. And both the decree and the Act except the reservations from confirmation. We respectfully submit that the Government has finally disposed of the land claims of the city of San Francisco. But, leaving Acts of Congress out of view entirely, the *title* is in the Government, and must prevail until after final confirmation and *survey* and the issuing of a *patent.* The case is really settled by *Singleton* v. *Touchard*, 1 Black.

THE DEFENDANT IS IN POSSESSION AS AN OFFICER OF THE GOVERNMENT.

One point further: General McDowell is in charge of the lot in controversy, as an officer under orders of the Government. Individually he has no possession in law, any more than a hired servant has of the dwelling of his master. Could an action be maintained against the Collector of the Port to recover possession of the Custom House? Or against the Superintendent of the Mint, for that building? Custom House officers cannot be garnisheed for goods in their charge, nor the Superintendent of the Mint for the gold dust of a de-

positor. In such cases, the possession is the possession of the Government through its agents.

We respectfully submit that the judgment of the Court below ought to be affirmed.

DELOS LAKE,

Of Counsel for Defendant in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

EMIL GRISAR,

Plaintiff in Error,

vs.

IRWIN McDOWELL,

Defendant in Error.

BRIEF FOR PLAINTIFF

of Counsel for Plaintiff in Error

Dollbaum & Co. print, 511 Commerce Street, cor. Merchant.

IN THE SUPREME COURT

OF THE

United States.

EMIL GRISAR,

Plaintiff in Error,

vs.

IRWIN McDOWELL,

Defendant in Error.

Statement of the Case.

This was an action brought in the Circuit Court of the United States, for the district of California, to recover the possession of certain real estate, situate at Point San Jose, or Black Point, in the City and County of San Francisco, and known and distinguished on the map of said city as Block 104, and the southerly half of Block 105 of the western addition to said city.

The cause was tried before the Court, sitting without a jury, by stipulation duly filed, and resulted in a finding and judgment for the defendant. The case comes up on bill of Exceptions.

At the trial, the plaintiff proved that he was in the actual occupation of the premises in controversy at the date of the alleged entry, and that the defendant on that day entered and ousted him. That the premises in question are within the limits of the four leagues claimed by the City of San Francisco, as the succe-sor to the Pueblo of San Francisco. and confirmed to the City and County of San Francisco by a decree rendered in that Court in the case of the United States v. The City of San Francisco. That at the date of the introduction into the Common Council of the City of San Francisco of an ordinance passed on the 20th day of June, A. D., 1855, entitled "An Ordinance for the settlement and quieting of land titles in the city of San Francisco," the grantor of the plaintiff was in the actual possession of the said premises, within the meaning of the said ordinance; and the said ordinance together with the act of the legislature of the State of California, passed March 11, 1858, confirming the same entitled " An Act concerning the City of San Francisco, and to ratify and confim certain ordinances of the Common Council of said city were put in evidence."

The 2d Section of said ordinance provides that " The City of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D., 1855, and to their heirs and assigns forever. * * * Provided such possession has been continued up to the time of the introduction of this ordinance in the Common Council." And the said Act of the Legislature, after reciting the said ordinance and certain other ordinances of the City of San Francisco provided in Sec. 2 of said Act. "That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three, of the ordinance first above recited shall take effect as fully and completely for the purpose of transfering the city's interest, as if deeds of release and quit claim had been duly executed and delivered to and in favor of them individually by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title,

rights, benefits and advantages, which the said order and ordinances intend or purport to transfer or convey according to the true intent and meaning thereof." These are all the provisions of said ordinance or statute that are material to be considered in this case.

It was admitted that said land was within the corporate limits of the City of San Francisco, as described in the Act to incorporate said city, passed April 15, 1851.

The plaintiff then rested his case.

The defendant then offered in evidence an order of the President, of the United States dated Nov. 6th, 1850. Plaintiff's counsel objected to its admissibility. 1.—For indefiniteness of description. 2.—Because it did not include the land in controversy. 3—Because the President could not make a reservation out of the land of the Pueblo. Defendant's counsel stated that he should claim nothing for this order except as it is connected with the subsequent order. The Court overruled the objections, admitted the evidence and plaintiff excepted.

The order made by President Fillmore reads: "The President of the United States, exempts and reserves from sale for public purposes the following tracts or parcels of land in the State of California: I. In the Bay of San Francisco. 1st, from a point 800 yards south of Point Jose, to the southern boundary of the Presidio; along the southern boundary to its western extremity; and thence in a straight line to the Pacific Ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos." A number of other reserves follow. This order of the President is communicated by Geo. T. M. Davis, Chief Clerk of the War Department, on the 7th day of November 1850, to Hon. Justin Butterfield, Com. Gen. of Land Office, and by him to Samuel D. King, Esq., Surveyor Gen. of Cal. on the 24th day of June 1851.

Defendant then offered in evidence certain other documents as follows:

I. A communication from Jas. G. Totten. Brevet Brig. Gen. of Engineers, dated Oct 28th 1851, addressed to Hon. C. M. Conrad, Secretary of War, stating that the Sur. General of California had applied for "instructions to enable him to run the lines of the lands proposed as government reservations." "That it thus appeared that some of these reservations have not yet been surveyed; that it is desirable to change the limits of one of the reservations," (the one above described); that, "subsequent to this action of the Board a private claimant to all this tract proposed to the Joint Board, through Capt. Halleck, Engnr. to substitute the following bounds for those first mentioned, with the understanding that if accepted by the government, the claimant would resign all pretentions to title within the reservation as thus modified. The government, to reserve the promontory of Point San Jose within boundaries not less than 800 yards from its northern extremity, and the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract, to the southern extremity of a pond lying between Fort Point and Point Lobos, and north and east of a line passing through the middle of said pond and its outlets to the channel of entrance from the ocean." This was accompanied by a sketch which he says: "Shows the reserves as originally proposed and conjecturally drawn by the Board; also the two separate reservations now proposed to be substituted for it." A copy of this is in the record. Secretary Conrad on the 29th of Dec. 1851, transmits this reccommendation to the President, and on the 31st of December 1851, President Fillmore makes an order in accordance with the reccommendation, making two smaller reservations in place of the one first above described; one of which includes the land in controversy; viz :

"1st. The Promontory of Point Jose, within boundaries not less than eight hundred yards from its northern extremity."

The counsel for the plaintiff objected to the admissibility of these documents.

1. That the transaction evidenced by these documents was a compromise between the government and certain claimants un-

der Benito Diaz, whose land did not include the premises in question.

2. That the purpose of the proceeding was to cut off a portion of the reservation, and not to extend its boundaries.

3. That these bounds do not include the premises in controversy.

4. That the order did not intend or purport to make a reservation, but to direct a survey for the purpose of future action.

5. That a reservation could not be made out of the lands of the Pueblo of San Francisco.

The Court overruled these objections and admitted the testimony, and the plaintiff excepted.

It was admitted that this order was transmitted from the War Department to the Land Office, on the 3d of March 1852, and from the Land Office it was sent to the Surveyor General of California soon thereafter, and that the premises in controversy are within a circle drawn with a radius of 800 yards, mentioned in said order and shown on the map accompanying.

It was proved that the premises in controversey, with others, were taken possession of under an order in these words.

"Washington, D. C., Oct. 2, 1863.

To Brig. Gen. G. Wright.

The Secretary of War directs that you take military possession of Point San Jose, and erect the Battery proposed for its defense; the question of ownership will be determined hereafter." H. W. Halleck, Gen. in Chief.

That General Wright proceeded at once to take military possession and directed the Engineers to construct the work on the point. The work had been completed when General McDowell came here. The immediate possession of Gen. Wright was the point, and the ground which was formerly occupied by Mrs. Fremont, and two or three buildings inland from it. The occupancy did not extend to the plaintiff's place. He was required to leave about the 15th or 16th of June, 1865. Gen. McDowell

had then come into command; he came into command on the 1st of July 1864, and then proceded to take possession of all the grounds of the reservation, and that included Mr. Grisar's place, a radius of 800 yards from the point, would include his place and the Bensley Water Works, and the Woolen Factory to the east of him. General McDowell is in command as Military Commander of the Department of California; he took possession as such, and the point is now held by the military authorities.

It was proved by the plaintiff, that, if a line is run from the extreme northern point of Point San Jose due south, those blocks would lie to the east of it.

Defendant then offered in evidence, the decree of the Circuit Court in the case of the United States v. The City of San Francisco, rendered May 18th, 1865. It was admitted that an appeal had been taken from the decree by, or on the part of the United States, and was still pending. Plaintiff's Counsel objected to the admissibility of this decree in evidence pending said appeal. The Court overruled the objection and admitted the evidence, and plaintiff excepted.

This decree confirms to the City of San Francisco, four square leagues of land, but it excepts from the confirmation the military reserves.

Defendant then rested his case.

Plaintiff then put in evidence the petition of the City of San Francisco to the Board of Land Commissioners, which was for four leagues of land without any exception, and the decree of the Board, therein which confirmed to the city, all the land north of a certain line, including the premises in controversy, and rejecting the claim of the city to the remainder of the land claimed; and showed that the Transcript from said Board was filed in the District Court of the United States, for the Northern District of California, on the 1st day of March, A. D., 1856. That on the 27th of February 1857, the Attorney General of the United States gave notice, that, "In the case of the claim of the City of San Francisco confirmed to the claimant by the Commissioners, Case Number Two Hundred and Eighty, (280) appeal

will not be prosecuted by the United States." That on the 30th March 1857, Mr. Blanding, United States District Attorney, and J. B. Crockett and Halleck, Peachy and Billings, Attorneys for the claimant, signed and filed a stipulation, "in pursuance of the said notice from the United States Attorney General thereto annexed; that the appeal taken in this case from the United States Land Commission by the United States, be dismissed; that the notice of intention to prosecute said appeal on behalf of the United States be withdrawn, and that claimants have leave to proceed under the decree of said Land Commissioners in their favor, as under Final Decree." That thereupon on the 30th of March, 1857, in the said District Court on filing the said notice and stipulation, "on motion of the District Attorney, it was ordered adjudged and decreed, that the appeal taken by the United States from the decision of the United States Land Commissioners in this case be dismissed, and the claimants have leave to proceed under the decree of said commission heretofore rendered in their favor as under final decree." That the case was, afterwards, under the Act of Congress relating to city claims, transferred to the Circuit Court, where the decree, hereinbefore recited, was entered on the 18th of May, 1865, from which an appeal was taken on behalf of the United States.

The case was here closed, and after argument submitted and taken under advisement. The Court afterwards filed its findings in favor of the defendant, and the plaintiff excepted.

Points.

1. That San Francisco was an organized municipal body or Pueblo at the time of the American occupation, and for a long time anterior thereto.

2. That as such Pueblo she was by the Mexican law the owner, or proprietor in fee, of four square leagues of land.

3. That the limits of the land were certain, viz: The domain was bounded on all sides but one by the waters of the high seas,

and on the remaining side by a due east and west line so drawn as to include the area of four square leagues.

4. That the title which the said Pueblo had was not an inchoate or imperfect title in the sense in which it is understood as applied to the jurisdiction of the Board of Land Commissioners. That the entire fee and use—the dominion—both direct and useful was in the Pueblo.

5. The domain of the Pueblo was private property and formed no part of the public domain; consequently the President could not make a reservation out of it.

6. The order of President Filmore, made in 1850, did not effect the land. 1. The land was not subject to reservation. 2. The order was not intended as a reservation, but was only preliminary thereto. 3. The order only gave two boundaries and enclosed nothing. 4. If it enclosed anything it excluded the premises in controversy.

7. The act of Congress of March 3, 1851, was a recognition of the pre existing title of the city, and estopped the United States from setting up or pretending to any title after that.

8. The order of the President, made Dec. 31, 1851, is ineffectual to affect the title to this property. There was no intention to extend the boundaries of the reservation; but, on the contrary, to throw out a part of it in compromise; and the intention and meaning of the order is to reserve so much of the original reservation as would fall within a circuit of 800 yards from Point San Jose. That the order was not a reservation, but only a preliminary directing a survey as the basis of future action.

9. The order under which Brig. Gen. Wright took possession of the extreme point and erected a battery, reserving the question of title, was not an exercise of any proprietory right by the Government, but of the right to erect military works in time of war wherever public necesities demanded them, and had its full measure and scope in his action. And the entry of the defend ant, McDowell, upon the land of the plaintiff, after peace was declared, cannot be justified under or connected with that order.

10. The decree of the Circuit Court of the United States in the case of the United States v. The City of San Francisco was not admissible in evidence, an appeal having been taken therefrom, which destroyed its effect as evidence of title.

11. The decree entered by consent in the United States District Court, on motion of the United States District Attorney, that the United States would not prosecute an appeal from the decree of the Board of Land Commissioners, and that the city should have leave to proceed upon that decree as upon a final decree; was a final adjudication of the title to the land embraced within it, and was not subject to further review and vested the title absolutely in the city

12. That the Ordinance of the city of San Francisco and the Act of the Legislature of California, introduced in evidence, vested in the plaintiff a full and perfect title to the land in controversy.

13. The United States cannot exercise military jurisdiction in any place within the body of the State (except in time of war), unless the jurisdiction over such places is ceded to the Federal Government by the State Government.

Preliminary.

The plaintiff brings this suit in accordance with the practice of the State of California, to recover the possession which was taken from him by the defendant. It is admitted that the plaintiff at the time of the entry of the defendant was, and for more than ten years had been, in the quiet, peaceable and actual occupation of the premises in question; that he was at the time of the entry actually residing thereon, occupying the premises as his family residence, and that the defendant forcibly entered and ousted him.

This is sufficient, according to the laws of the State of Cali-

fornia, to entitle the plaintiff to recover the possession, unless the defendant shows a right of entry.

"Possession is always *prima facie* evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser;" Hutchinson v. Perley, 4 Cal., 34. Hicks v. Davis, 4, Cal., 69. Winans v. Cristy, 4 Cal., 78. Plume v. Seward, 4 Cal.. 96. McMinn v. Mayer, 4 Cal. 210. Bequette v. Caulfield, 4, Cal., 278. Ramirez v. Murry, 4 Cal., 293. Russell v. Ford, 5 Cal. 250. Grover v. Hawley, 5 Cal., 486. Covillaud v. Tanner, 7 Cal., 39. McCann v. O'Connell, 7 Cal., 153. Bird v. Lisbros, 9 Cal., 5. Naglee v. Macy, 9 Cal.. 407. Potter v. Knowles, 5 Cal., 88. McClintock v. Boyden, 5 Cal., 101. Norris v. Russell, 5 Cal., 250. Bradshaw v. Treat, 6 Cal., 172. Burdge v. Smith 14 Cal., 383. Payne v. Treadwell, 16 Cal. 244. Corell v. Cain, 16 Cal., 572.

I believe this to be the law throughout the United States. Ricard v. Williams, Cal., 7, Wheat. 59, 105, 106. Jackson v. Town, 4 Cow..602. Jackson v. Porter, 1 Paine. 457. Perrymans Lessee v. Callison 1 Tenn., Rep., 515. Jackson v. Harder, 4 Johns, 202. Hovey v. Furman, 1 Penn. State Reps. 295. Lessee of Hall's heirs vs. Hemphelt's heirs, Ohio S. R., 551. Whitney vs. Wright, 15 Wendell, 171. Soureer v. McMillans, p. 23, 4 Dana, 461. Smoot v. Lecott, 1 Stewarts R. 890.

Possession is evidence of title in fee. The defendant being in possession is *prima facie* rightfully in possession; but when it is shown that he entered upon the prior possession of the plaintiff presumption changes and the same fact of possession raises the same presumption in favor of the prior possession of the plaintiff.

So far as this State is concerned, and the rights of property among its citizens, and its domestic law, the interpretation of the Supreme Court of the State is binding upon the Federal Courts.

Upon this showing the plaintiff is entitled to recover unless the defendant shows a right of entry.

The defendant claims no right of entry in his own right but

only as an officer of the United States. If the United States had a right of entry upon the said lands, it had the right to order the defendant to make such entry; and if the government, having such right, gave such order, and the defendant acted in obedience to it, the order is a complete justification. But if the government had no such right, then any order which it may have given is a nullity and affords no protection to any one. Wilcox, v. Jackson, 13 Peters, 516. Mitchell vs. Harmony, 13 How., 118. Adkins v. Brewer, 3 Cowen, 208. Miller v. Brinkerhoff, 4. Denio, 118. Vosburgh v. Welsh, 11 Johns, 175; 10 Johns, 169; 17 Johns, 146; 14 Johns, 246; 19 Johns, 39; 2 Johns, Cas. 27.

It is not contended that the defendant entered upon the land in the exercise of any right of eminent domain or as taking private property for public use. The defendant undertakes to justify his entry solely upon the ground that *the premises in controversy were property of the United States.* If he fails to show that the premises in controversy were property of the United States, or if he fails to show that he had any right to enter upon such lands of the United States, or if we show affirmatively that they were not property of the United States, he fails in his defense.

The only right which it is pretended that the United States have over the premises, is that the President of the United States reserved it. That is, that it is a government reserve.

I.

San Francisco was an organized municipal body, or Pueblo, at the time of the American occupation, and for a long time anterior thereto.

In the case of Fremont v. the United States, 17 Howard 537, this court decided that the laws prevailing in California at the date of the cession were not foreign laws, of which proof is required, but domestic laws of which the courts take judicial cognizance; and of these domestic laws, this court has frequently decided, the highest court of the state is the proper interpreter.

Whether or not San Francisco existed as an organized municipal corporation or pueblo at and before the date of the conquest, is as much a question of domestic law as whether San Francisco is at the present time and incorporated city and county, a public municipal corporation. But whether this Court takes its interpretation from the Supreme Court of this State or interprets these laws it-elf, the result must be the same.

"San Francisco having been constituted by a public political act of the former government a pueblo, we must take judicial notice of its existence, powers and rights, and among these last its general boundary and jurisdiction. Greenleaf (p. 8 sec. 6.) states the rule thus: 'Courts also take notice of the territorial extent of the jurisdiction and sovereignty exercised *defacto* by their own government, and of the local divisions of the country as into states, provinces, cities, towns, local parishes or the like, so far as political government is concerned or affected; and of the relative positions of such local divisions, but not of their precise boundaries farther than they may be described in public Statutes;' (see also 5 Wendell, 1 Scammon, 9 Shepley, referred to in note.)"

"So courts are bound to take notice of matters of public history, affecting the whole people. So of the laws and general acts of a public character of judicial and political officers, of such would be those acts creating and regulating pueblos; and this rule applies as well to the acts and officers of the former government as to those of its successors, (1 Greenl Ev. Sec 7 and cases,)" (Payne and Dewey v. Treadwell, 16 Cal. 231.)

In 1769, the Viceroy of New Spain, by command of his Majesty, dispatched an expedition under the command of Don Pedro Fages and Captain Riviera, accompanied by a number of missionaries, instructed to found settlements in Alta California. In each settlement there was to be founded a presidio for its protection, and a mission to collect together and civilize the natives; the Presidio was under the command of a Military Officer, and the Mission under charge of a lay Missionary; both were government officers. These settlements were intended to be towns or

pueblos. They were to be in charge of the missionaries for ten years and then "*secularized*," that is transferred to the government of the ordinary civil powers; one of these towns thus founded was San Francisco, founded in 1776. In 1834 it was secularized. An ayuntamiento or town government was organized, which went into office January 1st, 1835, and from that time it continued under the civil power as a pueblo. On the 7th of July, 1846, the American forces took possession of California. On the 2d of February, 1848, the treaty of Guadalupe Hidalgo was entered into at Mexico, and proclaimed at Washington on the 4th day of July, 1848. By this treaty peace was established. California was transferred to the United States, but the rights of property acquired before that were preserved.

The Board of Land Commissioners in making their decree in the city case. decided that San Francisco was a Pueblo on the 7th day of July, 1846; the Attorney General of the United States, in giving notice that the United States would not prosecute an appeal from that decision, and the District Attorney in moving the decree of the District Court dismissing that appeal and decreeing that the city should have leave to proceed upon that decree as upon a final decree, conceded and admitted on the part of the United States that the decree of the Board of Land Commissioners was correct, and the decree of the Circuit Court, in the same case, was based upon the same fact.

In addition to these, we have various decisions of the Supreme Court of this State. That San Francisco was, at the date of the conquest, a Mexican pueblo, was first decided in the case of Cohas v. Raisin, 3 Cal., 450; which was followed in Welch v. Sullivan, 8 Cal., 199. But in the later case of Hart v. Burnet, 15 Cal., 616, the matter was again reviewed, and was argued at a greater length and more elaborately examined than any matter ever presented to that Court, and it was again decided that "San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo entitled to and possessing all the rights which the law conferred upon such

municipal organizations." This doctrine was reaffirmed in the subsequent case of Payne v. Treadwell, 16 Cal. 225.

Since those decisions the law is settled in California that San Francisco was, at the date of the cession, a *pueblo*.

II.

As such Pueblo she was by the Mexican law the owner, or proprietor in fee, of four square leagues of land.

"The laws of Spain fully recognise the right of cities, towns and villages to acquire and dispose of real estate subject to the royal regulations which were made from time to time for their government. And when once acquired neither the king nor his officers could take away or grant to others any of these municipal lands. 'Our will and pleasure is that cities, towns and villages shall retain their rights, revenues and municipal lands (*propios*), and that no grants be made of them; and we command that all grants of the same, or any part thereof which we may make to any person, be of no value whatever." Novissima Recopilacion, Lib. VII, Tit. 16, Law 1.

In law 20 of the same title and book, the king directs that all municipal lands occupied by any person without paying an equivalent rent, be forthwith returned to said cities, towns and villages; 'and, if any charters or grants of this property have been made by the king's own ancestors, or by our selves, we further command that they be of no value and they be neither obeyed nor fulfilled." (Cohas v. Raisin, 3 Cal., 446.) The Court then proceeds to examine the validity of grants made of these lands by the American Alcaldes during the war, and holding them valid, says (p. 452): "It will be remarked from what has preceded that *these are not grants of any portions of the public domain* made by officers of the conquering power, but are grants of *municipal lands* made by the regularly authorized municipal authorities, under the laws, usages and customs of the country, which were not changed or interfered with by the military or *de facto* governments organized under the laws of war." It

will not be denied that the Pueblo retained during the war all its rights to *municipal lands* which had been confered upon it previous to the war. *And, as all grants of land made to it must have been in full property*, the right to alienate was incident to *ownership*. And the conclusion to which this court arrives (page 453) is: "That by the laws of Mexico towns were invested with the *ownership of lands*."

In Hart v. Burnett, 15 Cal., 541, the Supreme Court say: "A pueblo when once established (no matter how or by whom composed) and officially and legally recognized as such, came immediately within the provisions of the general laws relating to pueblos, and was entitled to all the rights and privileges whether political, municipal, or of property which the laws conferred upon such organizations and corporations." "By Law 6, Tit. 5, of Book 4 of the Recopilacion: a new town containing at least thirty inhabitants and the other requisites for a municipal organization, was entitled to *four square leagues of land*, to be laid off in a square or prolonged form as the nature or circumstances of the land might require." "In the order of 1791, by the Commandant General to the Governor of California, for the formation of pueblos out of presidios, it is also especially directed that the extent of land for each of these pueblos shall be *four common leagues*, measured from the centre of the presidio square, viz: two leagues in each direction."

"Of course, under the law and royal instruction above referred to, and upon which this order was based, this form and these dimensions were to be changed according to the nature and circumstances of the land: as when the presidio was adjacent to the sea or on a bay, or when any portion of the land within such general limits had become private property or had been devoted to some other special object."

"It does not appear that any formal grants of land were made to the new pueblos in such cases; but their right or title, whatever it was, to land to the extent of four square leagues, or less, as the case might be, seems to have vested *ipso facto* on the formation or official recognition of such towns, and that the powers

of the municipal officers over such land resulted from the general laws, immediately on the municipal organizaton, and their elections and entry upon the duties of their respective offices, and that their powers might be restricted or enlarged by the political authority of the State."

"It follows, from what has already been stated, that when near the close of 1834 a municipality was erected at the presidio of San Francisco by the orders of the Governor and Territorial Deputations of California, and that place was officially recognized as a pueblo, and its organization completed by the election of the municipal officers provided for by the law, such pueblo became *ipso facto* vested with some right or title to four square leagues of land measured either in a square or prolonged form from the presidio square as a general central point; excepting so much of the space within the general limits as might not be susceptible of grant on account of its being water, the private property of individuals or corporations, or lands dedicated to or reserved for other purposes."

"The right or title by which the pueblos held these lands was of course, in no way dependent upon the powers which the political authority of the State might, at any time, confer on the officers of such municipalities" (page 554).

"It would seem from these definitions that pueblos held the *direct dominion* of these lands subject to certain trusts and uses, and the moderate and small portions which they were authorized to grant to individuals would be held by the latter as subject to such municipal tax, but in all other respects in absolute ownership with full right of disposition. These inferences would seem to result from the very words used in these documents" (page 557).

It is stated in the telegraphic dispatches in the San Francisco papers, that "the Supreme Court, in the case of Townsend v. Greeley, has decided that the pueblo lands are not subject to sale on execution, as they are held in trust by the pueblo for the benefit of the inhabitants. The decision of the others, among

them the Peter Smith cause, was similar." From which I suppose that the Supreme Court of the United States has substantially affirmed the decision of the Supreme Court of California in the case cited, and concur in their interpretation of the law.

III.

The limits of the land were certain, viz: The domain was bounded on all sides but one by the waters of the high seas, and on the remaining side by a due east and west line so drawn as to include the area of four square leagues.

"The law so expressly designates the manner in which the four leagues were to be laid off, that there could have been no particular necessity of marking them out upon the ground in order to segregate the land from the public domain." "Such marking out of boundaries was by no means necessary in order to vest a right or title in the pueblo." (Hart v. Burnett, 551). "The Mexican laws relating to the survey of the four square leagues which the laws assigns to the pueblo (found in Chaps. 11, 96, of the "Ordinanzas de Tierras y Aguas") are so very plain and specific that there could have been no possible difficulty in determining the exact boundaries. *They are precisely fixed by the law itself*" (*Ib.* p. 552).

"It appears from the official maps, made under the direction of the United States Surveyor General and the Superintendent of the United States Coast Survey, that the old presidio of San Francisco was situated near the middle of the northern extremity of the peninsula formed by the ocean and the bay of that name; that the width of that peninsula, as far south as the Mission Creek, is less than two leagues, and that still further south to the Buri Buri or Sanchez Rancho the average width is just about two leagues, although two or three points, as Lobos and Avisadero, project somewhat beyond these points, very nearly corresponding with indentations, as Mission Bay and Merced Lake, on the opposite side. Of course, the pueblo could acquire

no right or title to the ocean or bay; and, consequently, according to the law of its foundation, the four square or common leagues would be taken in a prolonged instead of a square form." (Hart v. Burnett, 15 Cal., p. 543).

"By the instructions referred to in the opinion, (the Ordinanzas de Tierras y Aguas,) the point from which the survey of the four square leagues to which the pueblo is entitled, is the centre of the old presidio square, and the survey is to be made in all directions, *i. e.:* north, south, east and west, so as to include in all the four square leagues. Making up for deficiencies in one direction (where these exist by reason of water being reached, etc.) by including the quantity thus deficient in another line or lines. By applying these rules of measurement to the peninsula of San Francisco, and taking the centre of the old presidio square, as the initial point of the survey, we find that the fundo legal of that pueblo is bounded upon the three sides by water, and that the fourth line must be drawn for quantity east and west straight across the peninsula from the ocean to the bay. The four square leagues (exclusive of the military reserve, church buildings, etc.) north of this line constitute the municipal lands of the Pueblo of San Francisco. The property here sued for is within this area." (Payne and Dewey v. Treadwell, 16 Cal., 230).

It will thus be seen, if these authorities are to be relied on, that San Francisco was vested with a legal title to four square leagues of land of definite and distinct boundaries, segregated by the law itself from the public domain, which needed nothing from the United States to make it perfect and complete.

IV.

The title which the said Pueblo had was not an inchoate or imperfect title in the sense in which it is understood as applied to the jurisdiction of the Board of Land Commissioners. That the entire fee and use---the dominion—both direct and useful was in the Pueblo.

The domain of the pueblo was, as we have seen, certain as to boundaries. "*Id certum est quod certum reddi potest.*" The boundaries were fixed by law. The aid of a surveyor might be required to ascertain the position of one of the lines upon the ground—to find out where it was; but he could not locate it, because the law had already located it, whatever was the title of the city; therefore, it was not a claim to have set off to it certain *quantity* of land generally, or in a tract of larger extent, but it attached itself to a certain piece of land which by that title and the law itself was segregated and separated from the public domain. It was not necessary, therefore, to call in the aid of the government to fix the locality or to designate the thing to which the right should attach, and jurisdiction over the premises cannot be ascribed to the Federal Government on that ground. It was not a *jus ad rem*, but a *jus in re*.

It remains, then, only to consider whether there was anything in the nature of the title itself which gave jurisdiction to the Federal Government. By the treaty of Guadalupe Hidalgo rights of property remained as they were at that moment. Legal estates and equitable estates were equally sacred. Such would have been the case even without this clause in the treaty. (Mitchel v. U. S., 9 Peters, 734.)

The title was a legal title in *fee simple absolute* vested in the pueblo; that is, the people. Towns, under Spanish law, were never incorporated. The settlement in virtue of orders of government was sufficient (10 Peters, 666). By the fact of settle-

ment and existence they became capable of holding, and vested with a title. The title vests in the community. (10 Peters, 713, 721, 723; 15 Cal., 557, 560.) All the Spanish writers agree that the *fee*—the *dominio propiedad*—was in the town. (10 Peters, 734, 725. 726, 730, 731). Neither the fee of the land nor the right to regulate its use ever passed to the Federal Government.

"The 9th Law, Title 20 of Partida 3, contains the following: 'The things which belong separately (or severally) to the commons of cities or towns are fountains of water. the places where the fairs or markets are held, or where the City Council meets the alluvions or sand deposits on the banks of rivers, and all the other uncultivated lands immediately contiguous to the said cities. and the race grounds and the forests and pastures, and all such other places which are established for the common use.'" (New Orleans v. The United States, 10 Peters, 724.)

"In the Novissima Recopilacion, Book 7, Title 16, Law 1, is the following: 'Our pleasure and will is to preserve their rights, rents and property to our cities, towns and places, and not to make any gift of any thing of them; wherefore, we command that the gift or gifts which we may make, or any part of them, to any person whatsoever are not valid.'"

"A faithful observance of these laws would have preserved the rights of the city, as to the common, free from invasion. No law was cited in the argument which showed the power of the King of Spain to alienate lands which had been dedicated to the public use. And it is clear that the exercise of such a power would have violated the public law which is understood to have limited the exercise of the sovreign power in this respect."

"As power was given to the King of Spain by law to grant permision to build on public places, it would seem to follow that such places were not only withdrawn from common, but that the king could not alien them; and if he had power to do this in as unlimited manner as over the crown lands it would include the exercise of every minor authority over them. If he could sell and convey the lands dedicated to public use surely, he might, with-

out any authority of law, grant permission to build on such lands" (*Ib.* p. 726).

"From a careful examination of the jurisdiction exercised over this common by the governments of France and Spain, and the laws which regulated this description of property in both countries, the conclusion seems not to be authorized that it was considered as a part of the public domain or crown lands which the king could sell and convey."

"The land having been dedicated to public use, was withdrawn from commerce; and, so long as it continued to be thus used, could not become the property of any individual. So careful was the King of Spain to guard against the alienation of property which had been dedicated to public use, that, in a law cited, all such conveyances are declared to be void."

"That both the Kings of France and Spain could exercise a certain jurisdiction over this common, and other places similarly situated, has been stated; but this was a police regulation and was rightfully exercised in such a manner as not to encroach upon the public use. This seems to be the result to which a careful examination of the laws and usages of both countries must lead us." (*Ib.* p. 731.)

"If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it as other lands, there can be no doubt that it passed, under the treaty, to the United States, and they have a right to dispose of it the same as other public lands. But if the King of Spain held the land in trust for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes; has this right passed to the United States under the treaty."

"That this common, having been dedicated to public use, was withdrawn from commerce and from the power of the king rightfully to alien it, has already been shown; and, also, that he had a limited power over it for certain purposes. Can the Federal Government exercise this power?" (*Ib.* p. 736.)

"It is enough for this Court, in deciding the matter before them, to say that, in their opinion, *neither the fee of the land in controversy, nor the right to regulate the use, is vested in the Federal Government;*" (*Ib.* p. 737).

It will be seen, therefore, that there was no inchoate or imperfect title here. An inchoate title is one that has commenced to be something which it is not. The pueblo title was, at the date of the cession, all that it was ever meant to be. It was not inchoate. It might well have been said to have been inchoate, when the settlement was first made, and the Presidio and Mission were founded in 1776, and during all the time that the pueblo was in tutelage and under charge of the missionary. But when in 1835, it was secularized and duly organized under the civil power, and was recognized as a pueblo by the political authorities, its title became complete, and could in no sense of the word be considered as inchoate.

Neither could it be considered imperfect. There was no imperfection to be cured. The land was held by the pueblo in trust for the members of the community, it is true, and its power of alienation was restricted, but the same is the case with all municipal bodies. The sovereign power, in all countries, exercises a certain control over municipal bodies, and limits, abridges or permits the alienation of their property. And it is just the same now that it was then. The Legislature of the State of California exercises precisely the same control over it at this moment. Various acts have been passed by the Legislature authorizing conveyances to be made, ratifying conveyances already made, directing some to be made, forbidding others; and confirming contracts and leases in respect to it. In short, it would be hardly possible to find an instance of the exercise of power on behalf of the governments of Spain and Mexico that has not its perfect parallel in some act of the Legislature in this State.

Is this an imperfection in the title? It presents certain qualities which distinguish it from other titles, but it is perfect of its kind. But does the Federal Government propose to change it? Can they? As neither the fee nor the right to control its use

is vested in the Government it cannot, in any respect, amend or alter the title. The most it can do is to recognize it; and when it *recognizes* it as a legal vested title over land in which the Government has neither the title nor the use, nor the right to control the use, it recognizes that the title and the land are beyond its jurisdiction.

There was no need to present it to the Board of Land Commissioners. As no title nor estate in this land was in the Government, nothing could come from them to cure imperfection or to complete what was commenced. Whatever the title was at the date of the cession, it remained when presented to the Board of Land Commissioners, and it will remain when it leaves the United States Courts, or the hands of the Government. Such a title Congress has no power to impair. It may quit-claim, and it may recognize, but it cannot take away one jot or tittle.

V.

The domain of the Pueblo was private property and formed no part of the public domain; consequently the President could not make a reservation out of it.

That this domain or common formed no part of the public domain is distinctly decided in the case I have cited, 10 Peters, 731: "The conclusion seems not to be authorized that it was considered as a part of the public domain or crown lands." "The land having been dedicated to public use was withdrawn from commerce."

It was conceded that the proceedings which were taken in 1850, were not sufficient to make a reserve, or to affect this property even if it had been Government land. But even those proceedings took place after the admission of California into the Union as a State; which event took place September 9, 1850.

"The State of Louisiana [California] was admitted into the Union on the same footing as the original States. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of the Federal Government, either for the purposes of police or otherwise, can be exercised over this public ground which is not common to the United States." "All powers which properly appertain to sovereignty, which have not been delegated to the Federal Government, belong to the States and the people."

That this was private land was also recognized by the Act to ascertain and settle the private land claims in the State of California, which provides that when any city, town or village existed on the seventh day of July, 1846, the claim for the same, that is, for the "lands which may have been granted for the establishment of a town by the Spanish or Mexican Government." "Shall be presented by the corporate authorities of the said town;" "and the fact of the existence of the said city, town or village on the said seventh day of July, 1846, being duly

proven, shall be *prima facie* evidence of a grant to such corporation."

There is no Act of Congress which directly confers upon the President the power to make reserves. It is not contended that a reserve can be made from any other that public land. The president has the right to reserve *from private entry* certain portions of the public domain. He has no authority to appropriate the land any more than he has to appropriate any other public property.

At first all persons were forbidden to enter upon the public domain, and the President was authorized to remove by force those who did so trespass. Afterward, settlement was permitted with the right of pre emption. A system of Government surveys subdividing the public domain into districts, townships, sections and quarter-sections, was devised, and as fast as the land was surveyed and subdivided these Acts of Congress permitted persons to settle upon it with a pre-emption to the quarter-sections on which they were located. That is, the right to take that particular quarter-section at the Government price of a dollar and a quarter per acre. Land so situate was declared open to private entry, and Registers were provided and Land Offices, where these entries might be made of record. But from the lands so open to private entry, it was provided that the President might reserve such as were appropriated to the public service, or which were deemed necessary for that purpose.

This is the extent of the right and power of the President; it is to withdraw and reserve public land from private entry. In California, land was by special act of Congress made subject to private entry which had not been surveyed and sectionized, and as a consequence, the power of the President to make reservations extended to those lands.

It has been doubted whether the Federal Government possesses the right of eminent domain, authorizing it to take private property for public uses. The question was discussed, but not decided, in the case of Gilmer v. Lime Point, 18 Cal. 250. The amendment to the constitution, which declares that private prop-

erty shall not be taken for public use, without just compensation, (Amendments to Con. U. S. Art. V.,) would seem necessarily to imply, that the Federal Government had such power. It would be idle and meaningless if the Government had no power to take private property in any event. But the Government, if the power is vested in it by the Constitution, can only exercise it by appropriate legislation. Congress has never seen fit to authorize the President to take private property for the public use. Nor could it be done in any event, even if so authorized, until compensations were at least provided; and there is moreover no pretence that the entry was made in this case under the exercise of any such right.

VI.

The order of President Filmore, made in 1850, *did not affect this land.* 1. *The land was not subject to reservation.* 2. *The order was not intended as a reservation, but was only preliminary thereto.* 3. *The order only gave two boundaries and enclosed nothing* 4. *If it enclosed anything it excluded the premises in controversy.*

1. It is not necessary further to discuss the proposition that the lands were not subject to reservation.

2. The document which is embodied in the communication of the Commissioners of the General Land Office, could hardly have been intended as a reservation. It is a simple list of localities indicating in general terms where reservations should be made.

3. But whatever the intention might have been, there certainly was a failure to carry it into effect. The premises in controversy are situate on Black Point, which is on the south side of the entrance of the harbor. Grisar's house was perhaps two hundered yards south of the extreme point. But the description of the reserve given, it will be perceived, does not commence at the point, but at a point 800 yards south of Point Jose. Whether this is to be measured from the extremity of the point or from its base, so as to exclude the locality called the point, is quite uncertain. But commence at this point, which in either event is far to the south of these premises, and follow the description and the line runs to the presidio; thence in the same direction to Mountain Lake; and in the same direction to the Ocean, where it ends. It never comes round to its starting point, and the whole description constitutes, in fact, but a single line.

"1st. From a point 800 yards south of Point Jose to the southern boundary of the Presidio; along the southern boundary to its western extremity; and thence in a straight line to the Pacific Ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos."

The Counsel for the defendant conceded that this amounted to nothing by itself, as a reservation, and only claimed that it had force as connected with the subsequent proceedings.

4. But if it could be construed that the line was to commence at the northern extremity of Point San Jose, and run due south 800 yards, it is shown positively by the testimony, and there was no attempt to question it, that the premises in controversy would lie to the east of and outside of that line. If there is anything to be gathered from the act tending to show what the intention was, it is that the reserve was to extend from a point 800 yards due south of Point San Jose, westward to the Pacific Ocean, and the fact is indisputable that the premises in controversy, would not fall within that tract, whatever might be its northern or southern boundary.

VII.

The Act of Congress of March 3, 1851, was a recognition of the pre existing title of the city, and estopped the United States from setting up or pretending to any title after that.

I cannot more clearly express my views on this subject, than by quoting the language of Judge Baldwin in Hart v. Burnett, 15 Cal.

"We have examined the law of 1851, with due care and attention, but we have not been able to find in it any provision which confers upon San Francisco any title to land. The fourteenth section of that law raises the presumption that any city, town or village of California, which existed on the seventh day of July, 1846 had a grant of land. But, what kind of a grant?"

"According to the view we have taken of the Spanish and Mexican law, relating to pueblos, this presumption existed without this act, and we doubt not that Congress was of the same opinion when it passed the law. That law simply re-affirmed a legal presumption which already existed, so far as the pueblos were concerned, merely requiring them to prove that they existed on the seventeenth day of July 1846, without going back to the period of their first organization as such municipal corporation. So far as their claim to four square leagues of land was concerned, they were not required to produce any title, the fact of their corporate existence being *prima facie* evidence of such title. But we have searched the law in vain to find any *granting* clause, and we are of opinion that it contains none," (pages 573, 574.) and after quoting the 14th section, the Court proceeds.

"There are no apt or usual words of grant. No land is described either by general or particular description. The act was drawn by able lawyers, who are not to be supposed to use language so inaptly as to attempt to create a grant by words implying a presumption of its pre-existence. The words do not import a grant. They have another and more natural meaning, and imply a different purpose. The *Senate debates* show an express

disclaimer of an intention to grant lands; and there was a rejection of the grant to the towns when the propositon, in the form of an amendment, was directly made after the bill was reported: and for the reason given by the Chairman of the Judiciary Committee. Mr. Berrien, that it was not expedient to grant lands, and the bill does not so design" (p. 574).

"While we do not accord to the Act of Congress the force or the character of a present grant, yet we attach to it in practical effect an operation which confirms the title of the city, for it cannot be denied that when the Federal Government makes a *prima facie* case against itself of a grant to the city of land from the fact of the existence of the town in July, 1846, and when it does this for the purpose or as connected with the object of the city's presenting before its own tribunals a claim for such land, it is not to be presumed that it meant to dispute that presumption, or to deny effect to it. To say nothing of the almost absolute impossibity of disproving the negative of the proposition of fact which the Government thus assumes; and, to say nothing of the bad faith which would be involved in its permitting numerous claimants of property to present their claims in the name of such city as under a primitive source of valid title, and then, after such presumption, denying such source of title. Apart from these things, we suppose no candid mind could possibly arrive at the conclusion that the case we have made in our statement, when added to the presumption afforded by the law of the actual fact of a grant duly made, could be so overcome. We know, that in point of fact, the Government does not mean, and has never designed, to make such a contestation. On the contrary, the claim has, so far, been recognized by all departments of the Federal Government; and the only appeal pending from the decision of the Courts is that made by the city itself."

"Now, this presumption of a grant being, as we have seen, equivalent in practical effect to a grant, so far as the city is concerned, let us inquire of what grant is the existence of a pueblo in 1846, a presumption? Plainly not of a grant by the Federal Government, but of a grant by the Mexican Government; and of what

sort of a grant? The answer is, of that species of grant which Mexico, by her laws, was in the habit of making to pueblos, with all the qualities, conditions and restrictions which characterized such grants. It is true there is no practical difference, so far as affects the Federal Government, between furnishing such a presumption against herself and making a grant in the usual form of the property; but there is a very great difference so far as the pueblo is concerned. It is the difference between proof of an old title and a grant of a new one; between the Federal Government giving the town a right and acknowledging the right as having been given by Mexico; all the difference, in short, between proof of title and title itself. By raising this presumption, the Federal Government affirms the title not to be in the Government, but just the contrary; it affirms the title to be against, and out of the Government and in the pueblo, and furnishes proof of this fact to the pueblo, whereby, as against the Government, she may maintain the claim" (p. 575–6).

"The result of this reasoning is, that upon this hypothesis, independently of all original claims of the city to the grant of lands to the old pueblo, her predecessor, she has the title to them not by a concession of the lands by the Federal Government, but by a concession by that Government of such a state of proof of an anterior title as establishes such title against that Government, the only other claimant. But she stands on this title not as a title *granted* by the Federal Government, but as a title acknowledged by that Government" (p. 577).

I can add nothing to the force of this reasoning. If it be true, then, that the Government is estopped to deny that the city had a grant of these lands from the Mexican Government, how can it be pretended that they ever became part of the public domain, or that the President can appropriate any part of them to the public service?

VIII.

The order of the President, made Dec. 31, 1851, *is insufficient to affect the title to this property.* 1. *There was no intention to extend the boundaries of the reservation; but, on the contrary, to throw out a part of it in compromise; and the intention and meaning of the order is to reserve so much of the original reservation as would fall within a circuit of* 800 *yards from Point San Jose.* 2. *The order was not a reservation, but only a preliminary directing a survey as the basis of future action.* 3 *That a reservation could not be made out of those lands.*

1. It will be remembered that on the trial of the cause, when the order of November 7th, 1850, was offered in evidence and objected to because of the want of certainty of boundaries, the counsel for the defendant stated that he did not claim that it had any effect of itself, but only as a basis for the order of December 31st, 1851, and in connection with that which he proposed to offer.

It is evident that the government regarded it in the same light; for the first step which we find in the Modification of 1851, is a communication from Gen. Totten, in which he states that the Surveyor General of California, has applied to the Commissioner of the General Land Office, for some additional instructions to enable him to run the lines of the lands, proposed as government reservations, by the joint Board of Navy and Engineer Officers lately on that coast.

It appears from this language, that General Totten did not consider that any reservations had then been made, as he speaks of them merely as lands, *proposed or reccommended* to be reserved; and it is not surprising that the Surveyor General could not run the lines, for, so far, there were no lines fixed—no lines to run. And he further states that, up to that time, no survey had been made. And he further informs us, that subsequent to the action

of the Board, a private claimant has made claim to the lands, and has proposed a compromise by the terms of which two small reserves are to be substituted for the larger one first proposed; thus giving up to the private claimant a good part of the land. One of these reserves is "the promontory of Point San Jose, within boundaries not less than 800 yards from its northern extremity."

It is evident that there was an intention of reserving so much of the original proposed reserve as would fall within this description. It is not a very accurate description. There is no intention of reserving all the land within the circuit of 800 yards from the northern extremity, but only that the Government should reserve the *promontory* within these limits. If they intended to reserve all the the land within that circuit, it is somewhat singular that it was not so expressed where it was so much easier to do so than to use the uncertain and ambiguous terms employed. I submit that the more reasonable construction, taken in connection with the order of November, 1850, is to reserve so much of the original tract as would fall within that circuit.

2. It is evident from the language of the recommendation, and of the President's order thereon, that this was not regarded as a final action but only as preliminary. The proposition for a compromise came through Captain Halleck, and it was recommended that the Surveyor General should be referred to him, who would furnish him with "sketches which would enable him to run the lines in conformity with the foregoing description;" and he speaks of a sketch which accompanied his communication as showing the reserves as originally *proposed* and *conjecturally* drawn by the Board. And the line is not to be drawn as a circle of 800 yards, but the promontory within a distance of not *less* than 800 yards; evidently showing that the line was to be located by the Surveyor, under the direction of Captain Halleck. in accordance with his views of the military necessity.

3. It is not necessary to say anything more in regard to the want of power in the President to make reserves out of the pueblo domain. But it is proper to advert to the fact that at

VIII.

The order of the President, made Dec. 31, 1851, *is insufficient to affect the title to this property.* 1. *There was no intention to extend the boundaries of the reservation; but, on the contrary, to throw out a part of it in compromise; and the intention and meaning of the order is to reserve so much of the original reservation as would fall within a circuit of* 800 *yards from Point San Jose.* 2. *The order was not a reservation, but only a preliminary directing a survey as the basis of future action.* 3 *That a reservation could not be made out of those lands.*

1. It will be remembered that on the trial of the cause, when the order of November 7th, 1850, was offered in evidence and objected to because of the want of certainty of boundaries, the counsel for the defendant stated that he did not claim that it had any effect of itself, but only as a basis for the order of December 31st, 1851, and in connection with that which he proposed to offer.

It is evident that the government regarded it in the same light; for the first step which we find in the Modification of 1851, is a communication from Gen. Totten, in which he states that the Surveyor General of California, has applied to the Commissioner of the General Land Office, for some additional instructions to enable him to run the lines of the lands, proposed as government reservations, by the joint Board of Navy and Engineer Officers lately on that coast.

It appears from this language, that General Totten did not consider that any reservations had then been made, as he speaks of them merely as lands, *proposed or reccommended* to be reserved; and it is not surprising that the Surveyor General could not run the lines, for, so far, there were no lines fixed—no lines to run. And he further states that, up to that time, no survey had been made. And he further informs us, that subsequent to the action

of the Board, a private claimant has made claim to the lands, and has proposed a compromise by the terms of which two small reserves are to be substituted for the larger one first proposed; thus giving up to the private claimant a good part of the land. One of these reserves is "the promontory of Point San Jose, within boundaries not less than 800 yards from its northern extremity."

It is evident that there was an intention of reserving so much of the original proposed reserve as would fall within this description. It is not a very accurate description. There is no intention of reserving all the land within the circuit of 800 yards from the northern extremity, but only that the Government should reserve the *promontory* within these limits. If they intended to reserve all the the land within that circuit, it is somewhat singular that it was not so expressed where it was so much easier to do so than to use the uncertain and ambiguous terms employed. I submit that the more reasonable construction, taken in connection with the order of November, 1850, is to reserve so much of the original tract as would fall within that circuit.

2. It is evident from the language of the recommendation, and of the President's order thereon, that this was not regarded as a final action but only as preliminary. The proposition for a compromise came through Captain Halleck, and it was recommended that the Surveyor General should be referred to him, who would furnish him with "sketches which would enable him to run the lines in conformity with the foregoing description;" and he speaks of a sketch which accompanied his communication as showing the reserves as originally *proposed* and *conjecturally* drawn by the Board. And the line is not to be drawn as a circle of 800 yards, but the promontory within a distance of not *less* than 800 yards; evidently showing that the line was to be located by the Surveyor, under the direction of Captain Halleck, in accordance with his views of the military necessity.

3. It is not necessary to say anything more in regard to the want of power in the President to make reserves out of the pueblo domain. But it is proper to advert to the fact that at

this time Congress had passed the act of March 3, 1851, the effect of which was, as we have seen, a recognition of a grant to the Pueblo from the Mexican Government ante-dating the acquisition of the country. So that the Government, at this date, was estopped from claiming that this land formed any part of the public domain. The Act for the admission of California had also been passed, by which the State was put upon the footing of the original States; and the Federal Government had no pretense of right to take private property for public uses, whatever powers may have existed in the Federal Government while California was yet a territory.

IX.

The order under which Brigadier General Wright took possession of the extreme point, and erected a battery, reserving the question of title, was not an exercise of any proprietory right by the Government, but of the right to erect military works in time of war where military necessity demanded them, and had its full measure and scope in his action. And the entry of the defendant, McDowell, upon the land of the plaintiff, after peace was declared, cannot be justified under or connected with that order.

The only order emanating from any quarter respecting Point San Jose, is the order made on the 2d day of October, 1863, to Brigadier General G. Wright, by telegraph, and is as follows: "The Secretary of War directs that you take military possession of Point San Jose, and erect the Battery proposed for its defense; the question of ownership will be determined hereafter."

It will be preceived that this order is not an assertion of ownership on the part of the Government, as it is expressly stated that the question of title is reserved to be determined hereafter. It does not direct an entry with the view of asserting any such title; but directs the General to take *military* possession—not civil or legal, but military. And directs him further, to erect the battery proposed for its defense; this was the purpose of the entry and its limit. There is no mention of the government reserve. General Wright is not ordered to make entry upon or to take possession of the government reserve; but

he is instructed to take military possession of a certain point of land; a position of military importance; and he is to take possession for a military purpose—to erect a battery. It is the point where the battery is to be put that he is required to take possession of. This was in the midst of the war of the rebellion; and it was because of such war, and in the exercise of the powers conferred upon the government by a state of war that the order was issued and the entry made,

Did General Wright obey this order? It was dated Oct 2d, 1863, came by telegraph. The bill of exceptions says: 'General Wright proceeded at once to take military possession, and directed the engineers to construct the work on the point. The work had been completed when General McDowell came here. The immediate possession of General Wright was *the point*, and the ground which was formerly occupied by Mrs. Fremont, and two or three buildings inland from it. The occupancy did not extend to the plaintiff's place. He was required to leave about the 15th or 16th of June, 1865; General McDowell had then come into command. He came into command on the 1st July, 1864."

It is not pretended that any fault was ever found with General Wright's action, or that it was in any way disapproved, or that any new order was issued. He had executed the order a year before General McDowell came. He had not only taken military possession of the point, but he had erected the battery there, and the work was done. The order was completely executed and *functus officii*.

The right of the general government to take possession of property and erect bulwarks in time of actual war, is distinct from the right to take private property for public uses, and equally distinct from any assertion of proprietory right. It is quite independent of title. The government may, in the exercise of this right, take the property of any person, and without making or providing for any compensation previously. But this right can only be exercised under the pressure of immediate and

this time Congress had passed the act of March 3, 1851, the effect of which was, as we have seen, a recognition of a grant to the Pueblo from the Mexican Government ante-dating the acquisition of the country. So that the Government, at this date, was estopped from claiming that this land formed any part of the public domain. The Act for the admission of California had also been passed, by which the State was put upon the footing of the original States; and the Federal Government had no pre- to take private property for public uses, whatever ave existed in the Federal Government while Cal- et a territory.

nder which Brigadier General Wright took pos- ession of the extreme point, and erected a battery, reserving the question of title, was not an exercise of any proprietory right by the Government, but of the right to erect military works in time of war where military necessity demanded them, and had its full measure and scope in his action. And the entry of the defendant, McDowell, upon the land of the plaintiff, after peace was declared, cannot be justified uuder or connected with that order.

The only order emanating from any quarter respecting Point San Jose, is the order made on the 2d day of October, 1863, to Brigadier General G. Wright, by telegraph, and is as follows: "The Secretary of War directs that you take military possession of Point San Jose, and erect the Battery proposed for its defense; the question of ownership will be determined hereafter."

It will be preceived that this order is not an assertion of ownership on the part of the Government, as it is expressly stated that the question of title is reserved to be determined hereafter. It does not direct an entry with the view of asserting any such title; but directs the General to take *military* possession—not civil or legal, but military. And directs him further, to erect the battery proposed for its defense; this was the purpose of the entry and its limit. There is no mention of the government reserve. General Wright is not ordered to make entry upon or to take possession of the government reserve; but

he is instructed to take military possession of a certain point of land; a position of military importance; and he is to take possession for a military purpose—to erect a battery. It is the point where the battery is to be put that he is required to take possession of. This was in the midst of the war of the rebellion; and it was because of such war, and in the exercise of the powers conferred upon the government by a state of war that the order was issued and the entry made,

Did General Wright obey this order? It was dated Oct 2d, 1863, came by telegraph. The bill of exceptions says: 'General Wright proceeded at once to take military possession, and directed the engineers to construct the work on the point. The work had been completed when General McDowell came here. The immediate possession of General Wright was *the point*, and the ground which was formerly occupied by Mrs. Fremont, and two or three buildings inland from it. The occupancy did not extend to the plaintiff's place. He was required to leave about the 15th or 16th of June, 1865; General McDowell had then come into command. He came into command on the 1st July, 1864."

It is not pretended that any fault was ever found with General Wright's action, or that it was in any way disapproved, or that any new order was issued. He had executed the order a year before General McDowell came. He had not only taken military possession of the point, but he had erected the battery there, and the work was done. The order was completely executed and *functus officii*.

The right of the general government to take possession of property and erect bulwarks in time of actual war, is distinct from the right to take private property for public uses, and equally distinct from any assertion of proprietory right. It is quite independent of title. The government may, in the exercise of this right, take the property of any person, and without making or providing for any compensation previously. But this right can only be exercised under the pressure of immediate and

urgent necessity; and the occupancy cannot continue longer than the urgent necessity, nor extend beyond it.

The subject is very fully examined in the case of Mitchell v. Harmony, 13 How. Rep., 124. The rule there laid down is that the necessity must be immediate and impending, and not remote or contingent. The same doctrine is in substance laid down in Conwell v. Emory, 2 Carter's Ind. Rep., 35; 2 Kent, 238; Parkham v. The Justices etc., Decatur County, 9 Geo. 341, Mayor New York v. Lord, 13 Wend, 129; Russell v. The Mayor, etc, 2 Denio, 470, 471, 472, 473, 474, 475, 484, 485, 487: The Governor, etc. v. Meredith, 4 Durnford and East, 796.

It has been said that martial law cannot exist in this country; that even in the time of war the President acts under the laws and Constitution. That the maxim "*inter arma silent leges*" is obsolete (Luther v. Borden, 7 How., 145, and Storey on the Constitution, 1,171, 1,188, 1,189). But experience has taught the people that the law of necessity exists even in republics, and in spite of constitutions. But this law of necessity never authorized the permanent occupation of land by the ousting of a man from his inheritance. See 16 Viner's Abridgment Title Prerogative of the King, I, 1, 2, 3, 4, 6, 7, 8, 16, 28. It at most authorizes a temporary occupation. In the Saltpeter case cited by the Supreme Court of New York with approbation in the case of The Mayor of New York v. Lord, 17 Wend., 291, the justices say: "*after the danger is over the trenches and bulwarks ought to be removed so that the owner shall not have prejudice in his inheritance.*" "The king cannot give me power to oust another of his land;" 29 Ed., III, 25. None of the old writers speak of erecting forts it is only throwing up bulwarks, digging trenches—merely temporary earthworks. Conceding that in these times the improvement in military science necessitates works of a more imposing character than were used in the old times, still the principle remains the same. The law of necessity deprives no man of his inheritance; it merely authorizes a temporary occupancy, to endure so long as the necessity continues, and no longer. But what was the battery which Gen. Wright was ordered to erect.

It is not a fortress, nor a fort, nor a work of any permanent character. It was precisely such a work as, under the same military authority were, during the same period, thrown up by hundreds wherever our armies went. They were simply "*bulwarks and trenches*" intended to subserve the purposes of immediate defense, but not of permanent occupation.

It is evident that the Government and General Wright considered themselves as acting under this law. The fact that the entry was to be made, reserving the question of title, shows clearly that the Government did not by so entering intend to assert any title. It intended neither to assert nor disclaim it. The order was made under the pressure of immediate and pending necessity. The entry was made in pursuance of the order, and extended to the point where the battery was to be, and afterward was placed, and as much of the promontory as military necessity required. All that and no more General Wright took possession of. If the necessity had required the taking of our land, doubtless General Wright would have taken possession; and if he had not done so, or in any other respect had failed in obedience to the order, the War Department would justly and certainly have reprimanded him.

But the necessity did not extend to the taking of our land, and, therefore, General Wright did not take it. *Quod enim necessitas coget defendit*. The defense goes no farther than the compulsion. Here the necessity is satisfied. The fort is completed, and was occupied when General McDowell arrived here in July, 1864. The necessity which compelled the taking possession of the point had ceased.

If war had ever prevailed in California, it did not when General McDowell arrived here. "When the Courts of Justice are open and the judges and ministers of the same may, by law, protect men from oppression and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellion, etc., the peaceable course of justice is disturbed and stopped, so as the Courts of Justice be, as it were, shut up, then it is said to be time of war. *And the trial hereof*

is by the Record and Judges of the Courts of Justice. For then it will appear whether Justice had her equal course of proceedings at that time or no, and this shall not be tried by jury. Co. Litt., 249, I3" (16 Viner's Abridgment Title, Prerogative of the King, L. A. War).

How then does this order justify the entry of the defendant? It had fulfilled its purpose, and had been completely executed. The action of General Wright, approved by the Government and acquiesced in even by the defendant nearly a year after peace was established, had given a practical interpretation to the order, and defined the limits of the land covered by it. If the order protected the defendant in his possession of the point as successor to the military possession of Gen. Wright, after the war was over, it did not justify the defendant in making a new entry upon land not covered by the order, and after the necessity had ceased, which alone was the motive of said order, and justified its issuance.

It is evident that General McDowell did not enter under or by virtue of that order. The Bill of Exceptions says: "He then proceeded to take possession of all the grounds of the reservation, and that included Mr. Grisar's place. General McDowell is in command as military commander of the Department of California. He took possession as such; and the point is now held by the military authorities."

It therefore appears that the order of October 2, 1863 (1), did not authorize General McDowell to make any entry upon our land; (2), and that General McDowell did not enter under or by virtue of this order; (3), and that he did make entry upon the land as a Government Reserve, and by virtue of his office as commander of the department.

The question then arises, had he any right as commander of the department to take possession of a Government Reserve without any order from the department to that effect? The mere fact that lands are reserved from sale does not place them under the charge of the military authorities, nor confer upon any officer of the government the power to appropriate them to any

particular use. The President has the right to reserve from *sale* such lands as he thinks necessary; that is to say, all that *may* be required for government purposes. This is the extent of his power. It is exhausted when the order is made. There is nothing in this which is inconsistent with the occupation of the land by private persons. They cannot acquire title to it while the reservation continues. And whenever it is appropriated by Congress the private occupant must quit; but until then, he may occupy and defend his possession against all intruders. If General McDowell had a right to represent the Government in this matter, and the Government had a right to take possession, then he had a right to take forcible possession of the plaintiff's residence.

But I submit that he had no such right. The Government had never had any possession whatever of this land. There had been several communications, at an early day, looking to a reservation. But no survey had been made, no boundaries had been marked, and no symbol of possession. power or authority had ever been seen within the limits of Point San Jose. There never had been any proclamation, or any public assertion of right on the part of the Government. Fort Point, the Presidio, Alcatraz, the Hospital Reserve, were all occupied. On Fort Point and Alcatraz extensive works were erected, and continuously from the cession of California, up to this time, the Government has had a large military force here; but not a man nor a gnn was ever seen on Point San Jose, and whatever was proposed or done in regard to it, remained buried in the archives at Washington.

The last order of the President bears date December 31, 1851. Since that date there has been no assertion of claim on the part of the Government. A decree was rendered in favor of the city, confirming her title without any reserve of this land (though a reservation was made therein at Fort Point), and the Government acquiesced in this decree; gave notice that she would not prosecute her appeal; dismissed it, and on her own motion had a decree entered in the District Court declaring her appeal

dismissed and that the city should have leave to proceed upon this decree as under a final decree. This was in March, 1857. The Van Ness Ordinance which was passed in 1855, had remained a dead letter and unnoticed; but inspired and encouraged by this action of the Government, the Legislature of the State, at its very next session, ratified the ordinance conferring the title of the city upon the actual occupants. Immediately a change took place. Improvements sprang up all over the land to which the title was thus quieted. Subdivided into lots it was sold to the citizens, who proceeded to erect their houses and make their homes. This piece of land, at Point San Jose, was divided up into several homesteads. The land sloping to the east down to the waters of the Bay and looking toward the town was protected from the wind and commanded an enchanting prospect. Here gradually grew into beauty some of the most charming residences of San Francisco. The most beautiful of all, and the furtherest inland, was the residence of the plaintiff. When General Wright took possession of the point he ordered possession of so much as Col. DeRussy, the officer at the head of the Engineers, should decide was required for the military works. Col. DeRussy decided that plaintiff's premises were not required. Indeed, the part of the point taken possession of did not reach to the plaintiff's land by a considerable distance. Several other tenements intervened. General Wright did not take possession. But General McDowell, after being here a year, could not resist the temptation. He turned out the plaintiff from his beautiful residence, took possession of it, and established there his head-quarters. A house in the centre of the city would have been better, in every point of view, for head-quarters; but, as a residence, there was no place so beautiful as Mr. Grisar's, and the defendant took it.

There was no circumstance which then existed requiring this step. There was no time within the fifteen years that had passed since the treaty, when it was not as necessary to take possession. The Secretary of War did not claim the right to take possession of the property as a Government Reserve—but General McDowell did!

If it was the *duty* of General McDowell to take possession, then it was his right to do so. But if it was, his predecessors for fifteen years had all of them been singularly derelict. When citizens were making their settlements there, if the Government intended to make any claim, it was the duty of the Government to give them notice. And if the commandant is, *quo ad hoc*, the government, all of them had been grossly negligent. But after the Government had thus acquiesced for fifteen years in the occupation of these lands, it was not the duty or right of any officer of the Government to dispossess the occupant without process of law, and by mere military force.

(Grant vs. The United States
1. Nott & Huntington p. 47.)

X.

The Decree of the Circuit Court of the United States in the case of the United States v. The City of San Francisco, was not admissible in evidence, an appeal having been taken therefrom, which destroyed its effect as evidence of title.

The decree of the Circuit Court of the United States proved nothing, in fact. The defendant offered simply the decree without giving the roll in evidence. A decree is of no effect unless there is some allegation to support it. A decree without that is a mere nullity.

Later in the case we put in evidence the Petition of the City of San Francisco to the United States Board of Land Commissioners, praying confirmation of four leagues of land. This was the claim which she presented, and the only question before that Board, or the District and Circuit Courts was, whether that claim was entitled to confirmation. There was no allegation in the record upon which to base a decree that the United States was authorized to make reserves out of this land, and had done so. And least of all was there any authority in the Court to cut out from the claim of the city some unknown and undefined tract of land under that description. If the Court in that case had any authority to pass upon the question, it was its duty to have determined whether any reservations had been made, and what they were; and to so define them that the surveyor would only have a ministerial duty to perform in ascertaining where the lines ran. It is well enough, in an opinion, to lay down such rules as will guide the evidence; but a final decree, we submit, should not leave rights to the subject matter of the suit to be tried by a surveyor.

A decree cannot stand except there be a suit pending in which it is rendered. The Court must have jurisdiction; and, so far as

there is no allegation in the pleadings, there is no suit pending; and as to so much, the Court has no jurisdiction, and cannot render a decree.

In this case the City of San Francisco set up her claim to a right under the laws of Mexico, as a pueblo, to four square leagues of land. The United States appeared and contested this claim. This put at issue the fact of the existence of the Pueblo, and the extent of the land to which she was entitled. But it did not put in issue the adversary right, which is asserted on the part of the Government, for the first time, in the decree to appropriate all or any of the pueblo domain at its pleasure to the public service, or rather to reserve it for that purpose, in advance of actual necessity.

Nor can I see any reason why the exercise of this right should be limited by the entry of that decree. If the Court had excepted reserves made during the military occupation, or prior to the admission of California, or prior to the Act of March 3, 1851, there would have been some logical basis on which the decree would rest (provided a decree could be made without allegation), but if the right to make such appropriations existed in the Government up to the time of the entry of that decree, I cannot understand upon what hypothesis it is to terminate there. The decree of confirmation does not, as we have seen, create any title, for the Government had no interest in the fee nor right to control the use; it was merely the judicial determination of her antecedent title, and left it in the same state in which it found it. If, when the claim was presented to the Court and during the time that the cause was pending therein, the pueblo domain was subject to this servitude, it must necessarily emerge from the Circuit Court in the same condition.

But the decree having been appealed from was not evidence for any purpose. It is evidence that such a decree was rendered; of the *rem ipsam;* but it decides no rights, changes no *status*, determines nothing when offered in evidence to affect the title at issue in this cause; it is of no more effect than so much blank paper.

XI.

The decree entered by consent in the United States District Court, on motion of the United States District Attorney, that the United States would not prosecute an appeal from the decree of the Board of Land Commissioners, and that the city should have leave to proceed upon that decree as upon a final decree, was a final adjudication of the title to the land embraced within it, and was not subject to further review and vested the title absolutely in the city.

In the first case that came before the United States Supreme Court under this act the question was raised as to the constitutionality of the appeal to the District Court, and the Court held that the Board of Land Commissioners was not a court, and "that the suit in the District Court is to be regarded as an original proceeding; the removal of the transcript, papers, and evidence into it from the Board of Land Commissioners, being but a mode of providing for the institution of the suit in that Court" (United States v. Ritchie, 17 How. 534).

Indeed, the Constitution of the Board, its very name, its mode of procedure, the subject of its action, and the objects of its institution necessarily lead to that conclusion. It is convened as a Board. The officers are not judges, but commissioners, implying the exercise of a ministerial duty. It did not proceed as a court upon the filing of a complaint and the issuance of a citation. It sat simply as an inquest to ascertain what private land claims there were in the State of California, to recognize such as were perfect, and to make perfect and confirm those which were meritorious but imperfect. They sat simply to discharge a political duty that was imposed upon the Government by the treaty. Having covenanted to respect the possessions of the Mexicans, it was necessary that the Government should ascertain and settle them in order that they might be respected. When they had made their award, they filed a transcript of the re-

cord of their proceedings in the District Court. This is called in the act an appeal. But the Supreme Court held that it was not an appeal (p. 534). It is an original proceeding, instituted in that Court to set aside the award of the Commissioners. A bill to set aside an award of arbitrators would be an appeal to Chancery; but it would not be an exercise of appellate jurisdiction.

The Act of Congress of 31st August, 1852, provided (sec. 12) that the Secretary of the Board should file a copy of the transcript with the District Court, and that the filing of the transcript should, *ipso facto*, operate as an appeal for the party against whom the decision should be rendered; and either party who desired to prosecute the appeal were required to file notice to that effect with the Clerk within six months, and a failure to do so operated as a dismissal of the appeal.

In this particular case the decision was against both parties as to part of the land; and the filing of the transcript in the U. S. Dist. Court operated as the institution of a suit or the filing of a bill of review by each party. These suits were distinct and several. The claimant gave notice that she would prosecute her appeal. The United States gave notice that they would not. The consequence would have been without further action, that the suit of the United States would have been dismissed by operation of law. It is not an *appeal* that is pending, but an original suit, and the plaintiff chooses to withdraw his suit and release his cause of action. This was the effect of his failure to file a notice of intention to prosecute his suit. But Government did more. They affirmatively declared that they would not prosecute the suit, stipulated with the claimant that it should be dismissed, and the District Attorney, himself, made the motion and had the decree entered on record homologating these acts.

There was, then, no longer any suit pending concerning the land of the peninsula of San Francisco lying north of the so-called Vallejo line. There was only a suit pending, for the city claim

[NOTE TO PAGE 45.]

Where only one party appeals from the decree of the District Court in a land [illegible] the other cannot urge any objections to or modifications of the decree.

XI.

The decree entered by consent in the United States District Court, on motion of the United States District Attorney, that the United States would not prosecute an appeal from the decree of the Board of Land Commissioners, and that the city should have leave to proceed upon that decree as upon a final decree, was a final adjudication of the title to the land embraced within it, and was not subject to further review and vested the title absolutely in the city.

In the first case that came before the United States Supreme Court under this act the question was raised as to the constitutionality of the appeal to the District Court, and the Court held that the Board of Land Commissioners was not a court, and "that the suit in the District Court is to be regarded as an original proceeding; the removal of the transcript, papers, and evidence into it from the Board of Land Commissioners, being but a mode of providing for the institution of the suit in that Court" (United States v. Ritchie, 17 How. 534).

Indeed, the Constitution of the Board, its very name, its mode of procedure, the subject of its action, and the objects of its institution necessarily lead to that conclusion. It is convened as a Board. The officers are not judges, but commissioners, implying the exercise of a ministerial duty. It did not proceed as a court upon the filing of a complaint and the issuance of a citation. It sat simply as an inquest to ascertain what private land claims there were in the State of California, to recognize such as were perfect, and to make perfect and confirm those which were meritorious but imperfect. They sat simply to discharge a political duty that was imposed upon the Government by the treaty. Having covenanted to respect the possessions of the Mexicans, it was necessary that the Government should ascertain and settle them in order that they might be respected. When they had made their award, they filed a transcript of the re-

cord of their proceedings in the District Court. This is called in the act an appeal. But the Supreme Court held that it was not an appeal (p. 534). It is an original proceeding, instituted in that Court to set aside the award of the Commissioners. A bill to set aside an award of arbitrators would be an appeal to Chancery; but it would not be an exercise of appellate jurisdiction.

The Act of Congress of 31st August, 1852, provided (sec. 12) that the Secretary of the Board should file a copy of the transcript with the District Court, and that the filing of the transcript should, *ipso facto*, operate as an appeal for the party against whom the decision should be rendered; and either party who desired to prosecute the appeal were required to file notice to that effect with the Clerk within six months, and a failure to do so operated as a dismissal of the appeal.

In this particular case the decision was against both parties as to part of the land; and the filing of the transcript in the U. S. Dist. Court operated as the institution of a suit or the filing of a bill of review by each party. These suits were distinct and several. The claimant gave notice that she would prosecute her appeal. The United States gave notice that they would not. The consequence would have been without further action, that the suit of the United States would have been dismissed by operation of law. It is not an *appeal* that is pending, but an original suit, and the plaintiff chooses to withdraw his suit and release his cause of action. This was the effect of his failure to file a notice of intention to prosecute his suit. But Government did more. They affirmatively declared that they would not prosecute the suit, stipulated with the claimant that it should be dismissed, and the District Attorney, himself, made the motion and had the decree entered on record homologating these acts.

There was, then, no longer any suit pending concerning the land of the peninsula of San Francisco lying north of the so-called Vallejo line. There was only a suit pending, for the city claim

[NOTE TO PAGE 45.]

Where only one party appeals from the decree of the District Court in a land [illegible] the other cannot urge any objections to or modifications of the decree.

to the land south of that line and within the four leagues. In no legal sense could the decree of the Board of Land Commissioners be under review. It was not an appeal to equity; but an original suit.

This was the view taken of it in California by the Courts and the Legislature. The matter came almost immediately before the Courts. This dismissal of suit was entered in March, 1857, and at the July Term, of the same year, the case of Welch v. Sullivan was decided (8 Cal), in which the Court say (p. 196): "Parties who contest a grant by competent authority within the city limits after this confirmation which is now made final, the appeal having been dismissed by authority of the Government, must rely on a sufficient title issued by competent authority previous to the seventh of July, 1846." At the October Term of the same year the case of Norton v. Hyatt (8 Cal. 539), was decided, in which the Court say: "The confirmation of the City title by the United States Land Commissioners and the dismissal by the Attorney General of the United States of the appeal from that decision, has settled that no title to land within the limits of that city can hereafter be acquired from the United States. It also follows that any title accruing to individuals since the seventh July, 1846, must have been derived from the local authorities of the city."

As I have already noticed, the Legislature, at its next session, acted upon the same view, and proceeded to confirm the Van Ness Ordinance.

The matter did not again come before the Supreme Court in any reported case, until the case of Natoma Water and Mining Company v. Clarkin (14 Cal. 550), in which the court hold this language, Ch. J. Field delivering the unanimous opinion of the Court:

"On what ground the final decree of the Commission, and the order of the District Court, were held to be irrelevant testimony we are unable to perceive. The right of the plaintiffs to recover is based on the grant of the Mexican Government. *The*

decree of the Commission, rendered final by the withdrawal on the part of the United States of any appeal therefrom, is not only conclusive evidence of the validity of such grant and of its recognition by the United States, but also of the location of the specific quantity granted. *Against its effects neither the government, nor any parties claiming under the government, could ever assert any rights.* So far, then, from being irrelevant, the decree with its specific boundaries, and the order of the District Court granting leave to the claimants, under the stipulation of the officers of the Government to proceed thereupon as upon a final decree were, in the highest sense, relevant and material. They were, in fact, taken in connection with the grant, conclusive of the right of the plaintiff to recover provided the premises in controversy were within the designated boundaries. *A patent of the United States could have no greater effect upon the title;* the patent would, indeed, save the parties the necessity of proving anything beyond it, and limit the evidence in the case to matters arising upon mesne conveyances under the original grantee; but, so far as the *title* is concerned—the boundaries of the land being given—its segregation, in other words, from the public domain being made by the decree itself, *nothing further could be required.*"

XII.

That the Ordinance of the City of San Francisco and the Act of the Legislature of California, introduced in evidence, vested in the plaintiff a full and perfect title to the land.

"We think this Act valid and effectual for the purposes therein mentioned. The effect of it, and of this decision, is to declare valid, Alcalde grants made before and after the cession of California; also, the title to all lots held under sales by Commissioners of the Funded Debt; and it releases to parties in actual possession by themselves, or tenants, on the first of January, 1855, the lots so held by them, respectively, *giving to the release the effect of a perfect title*" (Hart v. Burnett, 15 Cal., 614).

These decisions have been affirmed in numerous subsequent decisions: Hubbard v. Sullivan, 18 Cal., 523; Board of Education v Fowler, 19 Cal., 23; Wolf v. Baldwin, 19 Cal., 306; San Francisco v. Bideman, 17 Cal., 463; Hubbard v. Barry, 21 Cal., 325; Carleton v. Townsend. 28 Cal., 223.

As this is a question of purely local law, I do not consider it necessary to add anything to those decisions.

XIII.

The United States cannot exercise military jurisdiction in any place within the body of the State (except in time of war), unless the jurisdiction over such place is ceded to the Federal Government by the State Government.

The Constitution of the United States, Art. I, Sec. 8, provides as follows: "The Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States; *and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.*"

Article X, of the Amendment, is: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Expressio unius est exclusio alterius. This provision of the Constitution is equivalent to a provision that the United States shall not exercise such exclusive authority in any place within a state not purchased by the Government for the purposes specified with the assent of the State.

Military authority is necessarily exclusive. *Inter arma silent leges.* The defendant claims to enter upon the land only by virtue of his office as mililary commandant, and to hold by military occupation.

"The Government of the United States is one of limited powers. It can exercise authority over no subjects except those which have been delegated to it. Congress cannot, by legisla-

tion, enlarge the Federal jurisdiction, nor can it be enlarged under the treaty making power" (New Orleans v. The United States, 10 Peters. 736).

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal Government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction" (*Ib.* 737).

"The State of Louisiana [California] was admitted into the Union on the same footing as the original States. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of of the Federal Government, either for purposes of police, or otherwise, can be exercised over the public ground which is not common to the United States."

"All powers which properly appertain to sovereignty, which have not been delegated to the Federal Government, belong to the States and the people" (*Ib.* 737).

"Where a fortress, within the acknowledged limits of a State, was surrendered under the treaty of 1794 with Great Britian, and was afterward constantly possessed and garrisoned by the United States, but was never purchased from the State by the United States, nor ceded to the latter by the former, the United States do not possess the right of exclusive legislation and exclusive jurisdiction over such fortress, but crimes committed therein may be punished under the laws and by the Courts of the State. To give the United States exclusive legislation and jurisdiction over a place, there must be a free cession of the same for one of the purposes specified in the foregoing clause of the Constitution; they cannot acquire it tortiously, or by disseizin of the State, or by occupancy with the tacit consent of the State, when such occupancy is as a military post for the purpose of protection, though obtained after a treaty by which foreign garrisons were withdrawn from our posts. It was, therefore, held that a murder committed in the fortress of Niagara, which is within

the boundaries of the State of New York, by one soldier of the United States upon another, was punishable under the laws of the State of New York, though that fortress had, ever since the treaty of 1794 with Great Britian, been occupied by the United States as a garrison, as no cession of it ever was made by the State of New York to the United States. (The People v. Godfrey, 17 John Rep., 225.)" Sargeant's Constitutional Law, pages 3 and 8.

"And the rule is the same, although the title to such place be vested in the United States, and it has been occupied by them as a military post; for if there has been no cession by the Legislature of the State to the United States, according to the foregoing clause of the Constitution, the right of legislation and jurisdiction over such place remains exclusively in the State where it is situate" (*Ib. Id*).

"Where such purchase has been made by the United States, with the consent of the Legislature of a State, of a place for the erection of a fort, etc., the land so purchased falls within the exclusive legislation of Congress and the exclusive jurisdiction of the Courts of the United States: for exclusive jurisdiction is attendant upon exclusive legislation" (*Ib. Id*).

The case of The People v. Godfrey, above cited, fully sustains the position of Mr. Sargeant; and it is further held that the United States acquired no right of property or jurisdiction by the cession from Great Britain; and citing the remark of Chief Justice Marshall, in the United States v. Bevans, 3 Wheat, 388, that "the power of exclusive legislation under the 8th section of the 1st article of the Constitution, which is, jurisdiction is united with cession of territory, which is to be the free act of the States," Chief Justice Spencer adds:

"But we are of opinion, that the right of exclusive legislation within the territorial limits of any State, can be acquired by the United States only in the mode pointed out in the Constitution;

by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings. The essence of that provision is, *that the States shall cede the particular place to the United States* for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseizin of the State; much less can it be acquired by mere occupancy with the implied or tacit consent of the State, when such occupancy is for the purpose of protection " (17 John, 233).

Chief Justice Marshall says, in the United States v. Bevans, " that cession of territory is essentially the same thing as a cession of general jurisdiction." " Places thus ceded to the United States are as much out of the jurisdiction of the State, as if they were out of the State; so much so, that persons residing there are not entitled to the benefit of the common schools of the town nor liable to any tax assessments, nor acquire any town settlement by residence therein, nor any election franchise as inhabitants of the town." (1 Met. R. 580; 1 Kent's Com. 381, 429.)

In the United States v. Cornell, 2 Mason's Rep., 69; United States v. Davis, 5 Mason's Rep., 356: it was held that a purchase of lands within the jurisdiction of a State, *with the consent of the State*, for the national purposes contemplated by the Constitution, did, *ipso facto*, by the very terms of the Constitution, fall within the exclusive legislation of Congress, and that the State jurisdiction was completely ousted. And Chancellor Kent says: " that the reservations to the States of the right to execute civil and criminal process in such places is no reservation of any sovereignty or jurisdiction " (1 Kent, 430).

Judge Story says: " the power, indeed, is wholly unexceptionable; *since it can only be exercised at the will of the State;* and, therefore, it is placed beyond all reasonable scruple. (The Federalist No. 43.) Yet, it did not escape without the scrutinizing

jealousy of the opponents of the Constitution, and was denounced as dangerous to State Sovereignty" (2 Story on Constitution, p. 119, sec. 1,224).

That which was considered so dangerous to State Sovereignty was the occupation of forts and military posts by the Federal Government within the body of the State; and the safeguard of protection which the Constitution extends to the State Sovereignty from this dangerous power is, that it can only be exercised with the consent of the State. There is no pretence that the State of California has ever ceded the premises in question, or has relinquished to the United States any portion of her sovereignty or jurisdiction over them. Yet, it cannot be denied, that the entry of the defendant upon the premises in question, was made in the assertion of the right of sovereignty and general jurisdiction in the Federal Government.

If, in the State of California, the Federal Government has the right to garrison and hold fortified posts at its pleasure, and without the consent of the State—a right which it confessedly cannot exercise in the original States—it cannot be said that she is on a footing with the older States. And the difference is in an essential particular which excited the extreme jealousy of the framers of the Constitution. The question here is with the defendant, and his right of entry. The only right he claims is as Commanding General of the Department, and to enter upon this place as within the exclusive jurisdiction and sovereignty of the Federal Government. We respectfully submit to the Court that to sanction such a pretention would be a clear violation of State Sovereignty, and would establish a dangerous precedent.

S. Wolcott
of Counsel

by purchase, by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings. The essence of that provision is, *that the States shall cede the particular place to the United States* for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseizin of the State; much less can it be acquired by mere occupancy with the implied or tacit consent of the State, when such occupancy is for the purpose of protection " (17 John, 233).

Chief Justice Marshall says, in the United States v. Bevans, " that cession of territory is essentially the same thing as a cession of general jurisdiction." "Places thus ceded to the United States are as much out of the jurisdiction of the State, as if they were out of the State; so much so, that persons residing there are not entitled to the benefit of the common schools of the town nor liable to any tax assessments, nor acquire any town settlement by residence therein, nor any election franchise as inhabitants of the town." (1 Met. R. 580; 1 Kent's Com. 381, 429.)

In the United States v. Cornell, 2 Mason's Rep., 69; United States v. Davis, 5 Mason's Rep., 356: it was held that a purchase of lands within the jurisdiction of a State, *with the consent of the State*, for the national purposes contemplated by the Constitution, did, *ipso facto*, by the very terms of the Constitution, fall within the exclusive legislation of Congress, and that the State jurisdiction was completely ousted. And Chancellor Kent says: " that the reservations to the States of the right to execute civil and criminal process in such places is no reservation of any sovereignty or jurisdiction " (1 Kent, 430).

Judge Story says: " the power, indeed, is wholly unexceptionable; *since it can only be exercised at the will of the State;* and, therefore, it is placed beyond all reasonable scruple. (The Federalist No. 43.) Yet, it did not escape without the scrutinizing

jealousy of the opponents of the Constitution, and was denounced as dangerous to State Sovereignty" (2 Story on Constitution, p. 119, sec. 1,224).

That which was considered so dangerous to State Sovereignty was the occupation of forts and military posts by the Federal Government within the body of the State; and the safeguard of protection which the Constitution extends to the State Sovereignty from this dangerous power is, that it can only be exercised with the consent of the State. There is no pretence that the State of California has ever ceded the premises in question, or has relinquished to the United States any portion of her sovereignty or jurisdiction over them. Yet, it cannot be denied, that the entry of the defendant upon the premises in question, was made in the assertion of the right of sovereignty and general jurisdiction in the Federal Government.

If, in the State of California, the Federal Government has the right to garrison and hold fortified posts at its pleasure, and without the consent of the State—a right which it confessedly cannot exercise in the original States—it cannot be said that she is on a footing with the older States. And the difference is in an essential particular which excited the extreme jealousy of the framers of the Constitution. The question here is with the defendant, and his right of entry. The only right he claims is as Commanding General of the Department, and to enter upon this place as within the exclusive jurisdiction and sovereignty of the Federal Government. We respectfully submit to the Court that to sanction such a pretention would be a clear violation of State Sovereignty, and would establish a dangerous precedent.

A. Wolfe
of Counsel

~~4 Febr 15~~ 15 Abril 1851

9 SL-1850

Nov 1850 circular

act con mem 3/1851

514

1 SL 420

13 Pebrs 512

Hilebrecht hist

Relfon No. 184

ARGUMENT

OF

MR. CUSHING

FOR THE PLAINTIFF,

IN THE

Supreme Court of the United States,

FEBRUARY 24, 1868,

IN THE CASE OF

EMIL GRISAR, PLAINTIFF IN ERROR,

VS.

IRWIN McDOWELL, DEFENDANT IN ERROR.

REPORTED BY D. F. MURPHY.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1868.

~~4 Febr 15~~ 15 abril 1857

9 SL-1850

Nov 1850 rimando
act con mandato 1857

514

1 SL 420

13 Febrero 512

Hildebrecht hnos

Reporter No. 184

ARGUMENT

OF

MR. CUSHING

FOR THE PLAINTIFF,

IN THE

Supreme Court of the United States,

FEBRUARY 24, 1868,

IN THE CASE OF

EMIL GRISAR, PLAINTIFF IN ERROR,

VS.

IRWIN McDOWELL, DEFENDANT IN ERROR.

REPORTED BY D. F. MURPHY.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1868.

ARGUMENT

OF

MR. CUSHING,

FOR THE PLAINTIFF,

IN THE

Supreme Court of the United States,

FEBRUARY 24, 1868,

IN THE CASE OF

EMIL GRISAR, PLAINTIFF IN ERROR.

VS.

IRWIN McDOWELL, DEFENDANT IN ERROR

REPORTED BY D. F. MURPHY.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1868.

Supreme Court of the United States.

EMIL GRISAR,
PLAINTIFF IN ERROR,
vs.
IRWIN McDOWELL,
DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

Mr. CUSHING. May it please your honors, it becomes my duty to open the discussion of this cause, in the absence of Senator Cole, the exigency of whose official duties has compelled him to withdraw from the oral argument. He has prepared and filed, however, an extremely instructive and able Brief, which will be in the hands of the Court, and to which its earnest attention is solicited. I shall have occasion, in the course of my argument, to refer to it from time to time, but shall not follow it step by step; and for that reason still more, we beg that the Court will give to it a careful perusal. It is, indeed, a complete, comprehensive, and exhaustive dissertation and argument on all the points apparent in this cause. And for myself, laboring at present under severe influenza, there is need of the indulgence of the Court, if proceeding somewhat slowly and dispiritedly, at least in the commencement of the argument.

The cause is one of very considerable interest, for several reasons. It involves, as value, a somewhat large amount of property. It also brings to the attention of the Court considerations of law, which are interesting, we may say

curious, and as we conceive not yet adjudged; and, on the other hand, it will be argued by the counsel for the appellee that it involves serious interests of the United States; and in all these points of view we shall be constrained, probably, to occupy the attention of the Court for the whole of the time accorded us by its rules.

And it is due in frankness, perhaps, for me to say further to the Court that, although with the consent and hearty concurrence of Mr. Cole taking his place in opening for the plaintiff, yet my retainer comes from another party. I appear in the name of this plaintiff, with the consent of the plaintiff's counsel of record, because questions of law substantially the same are involved, and the interests of his client differ only from the interests of my client in that those of mine are more distinctly and fatally prejudiced, possibly, by some views of the law than those of the plaintiff of record. So that, occupying this double relation to the case, the moral exigency upon me is in fact to do all possible justice to the rights of the plaintiff as well as of my immediate client. My immediate client, it would seem proper to state, is Mrs. General Fremont; and, when we come to the facts of the case, her interests will be seen, and their connection with those of the plaintiff, Mr. Grisar.

And with these prefatory explanations, we might come to the merits of the case, except that it becomes necessary to appeal to the Court, and more especially to his honor, Mr. Justice Field, to pardon me if the course of the argument should involve, as it will, necessary contradictions, not of any conclusions of law necessarily of his honor, Mr. Justice Field, who tried this case below, but rather of certain of the arguments by which his honor came to his conclusions. But, of course, neither my brother Johnson nor myself have any scruple upon this subject, because we know that it is one of the excellent qualities of our system of jurisprudence that any judge hears, with candor, an argument in a Court of Appeals, even although it be to contradict a judgment of his in the Court below, as that same judge would also hear, with

candor, any argument upon a motion for new trial which, in like manner, controverted his opinions. And we will now proceed, if it please your honors, to the merits of the case.

The suit to be considered is an action of ejectment brought by the plaintiff, declaring upon his possession in fee, against the defendant, Irwin McDowell,—a plea of ejectment with a defence which will be afterwards stated; and it comes here by writ of error upon exceptions, those exceptions constituting in substance a special verdict, found and signed by the judge by consent of the parties, the case having been heard by him without a jury; so that the facts are found in the form which this Court requires, that of a special verdict, with distinction only from an ordinary suit at law that the finding is the finding of the Court by agreement.

The plaintiff in the case sues, as we have said, upon his possession and claim of the title; and as the facts found, material as well to his side of the cause as to the defendant's, are as succinctly as possible set forth in the transcript, we shall now ask your honors to follow me in the exhibition of these facts as they appear of record.

On the trial the plaintiff proved that he was in the actual occupation of the premises at the date of the alleged entry, and that the defendant on that day entered and ousted him. It was further proved that the premises in question are within the limits of the four leagues claimed by the city of San Francisco as the successor to the pueblo of San Francisco, and confirmed to the city and county of San Francisco by a decree rendered in the Circuit Court in the case of the United States *vs.* the city of San Francisco; that, at the date of the introduction into the Common Council of the city of San Francisco of the ordinance passed on the 20th day of June, 1855, entitled "an ordinance for the settlement and quieting of the land titles in the city of San Francisco," the grantor of the plaintiff was in the actual possession of the said premises within the meaning of the said ordinance; and the said ordinance, together with the act of the Legislature of the State

of California, passed March 11, 1858, confirming the same, entitled "an act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the Common Council of the said city," were put in evidence and are made part of the record, and may be read from the printed volume of the statutes of that year; and it was further admitted that said land was within the corporate limits of the city of San Francisco, as described in the act to incorporate said city.

Thus your honors will see that the plaintiff claims under a title which he deraigns from a statute title conferred by the act of the State of California, and founded upon the previous premises stated in the finding; and we shall have occasion, presently, to refer your honors to that statute to show that it actually vests title.

To the case thus presented, the defendant introduced his proof as follows:

First, a letter signed by George T. M. Davis, purporting to be chief clerk of the War Department, dated November 7, 1850, addressed to Mr. Commissioner Butterfield, viz:

"WAR DEPARTMENT,
"WASHINGTON, *Nov.* 7, 1850.

"SIR: I am directed by the Secretary of War to enclose to you the written communication from the President of the United States, exempting from sale, and reserving for public purposes, certain pieces and tracts of land in the State of California.

"With great respect, your obedient servant,

"GEO. T. M. DAVIS,
"*Chief Clerk.*

"Hon. JUSTIN BUTTERFIELD,
"*Commissioner General Land-Office.*"

And then comes a letter, signed by the President, Millard Fillmore, addressed to the Commissioner of the General Land-Office, and by him forwarded to the Surveyor General of the district of San José, California, in the following words—reading only those parts which have any connection with the matter:

"GENERAL LAND-OFFICE,
"*January* 24, 1851.

"SIR: I have to inform you that the President of the United States exempts and reserves from sale for public purposes, the following tracts or parcels of land in the State of California:

"In the Bay of San Francisco, California—

"1. From a point eight hundred yards south of Point José, to the southern boundary of the Presidio, along the southern boundary to its western extremity, and thence in a straight line to the Pacific ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos.

"2. From the southern boundary of San Salito Bay, a line parallel to the channel of entrance to the Pacific.

"3. Yerba Buena Island.

"4. Alcatrazes Island.

"5. Angel Island, on eastern side of the Bay of San Pueblo.

* * * * * * *

"MILLARD FILLMORE.

"WASHINGTON, *Nov.* 6, 1850.

"I am, very respectfully, your obedient serv't,

"J. BUTTERFIELD,
"*Commissioner.*

"SAMUEL D. KING, Esq.,
"*Surveyor Gen'l, San José, Cal.*"

To this evidence there was objection, but it was admitted; and then comes a letter, signed by Brevet Brigadier General Totten of the Corps of Engineers, addressed to Mr. Secretary Conrad, recommending a modification of this so-called reservation for the reasons set forth, declaring, as your honors will find in the letter, that this modification is recommended in consequence of a compromise between some parties in interest, but not the present parties in interest, or any one under whom they claim, because the compromise relates to a different portion of the reservation; and all that is material in it is that he recommends in place of the first reservation, that of 1850, another as follows:

"The reservation including Fort Point, Point José, and the Presidio at the entrance of the harbor of San Francisco,

California, made by an order dated November 6, 1850, is hereby modified and reduced so as to embrace only the following-described two tracts of land, viz:

"1. The promontory of Point José within boundaries not less than eight hundred yards from its northern extremity.

"2. The Presidio tract and Fort Point, embracing all the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract, to the southern extremity of a pond lying between Fort Point and Point Lobos, and passing through the middle of said pond and its outlet to the channel of entrance from the ocean.

"MILLARD FILLMORE.

"Executive Chamber,
"WASHINGTON, *Dec.* 31, 1851."

Objection was made by the counsel for the plaintiffs to the admissibility of these documents; but the objections were overruled, and they were admitted. It was admitted that the last order was transmitted from the War Department to the Land-Office on the 3d of March, 1852, and from the Land-Office was sent to the Surveyor General of California soon thereafter, and that the premises in controversy are within a circle drawn with a radius of eight hundred yards, as mentioned in said order, and shown in accompanying map, to which we shall presently call the attention of the Court. Then comes this document:

"WASHINGTON, D. C., *Oct.* 2, 1863.

"To BRIG. GEN. S. WRIGHT:

"The Secretary of War directs that you take military possession of Point San José, and erect the battery proposed for its defence: the question of ownership will be determined hereafter.

"H. W. HALLECK,
"*General-in-Chief.*"

Now it only remains that we ask the attention of the Court to the subsequent proceedings, which are, that General Wright proceeded at once to take military possession, and directed the engineers to construct the work on the Point, and the work had been completed when General McDowell came to California. The immediate possession of General

Wright was the Point, and the ground which was formerly occupied by Mrs. Fremont, and two or three buildings inland from it. The occupancy did not extend to the plaintiff's house. He was required to leave about the 15th or 16th of June, 1865. A radius of eight hundred yards from the Point would include his place and the Bensly water-works, and the woolen factory to the east of him. General McDowell is in command of the military department of California; he took possession as such, and the Point is now held by the military authorities.

It was proved by the plaintiff that, if a line is run from the extreme northern part of Point José due south, these blocks would lie to the east of it. The Court will see, presently, the materiality of that, and we now ask its attention to the maps, as well those accompanying the transcript, as the one accompanying the brief and the map, which is down on the black-board, to which I shall presently advert.

In the plaintiff's Brief, in the first place, will be found a plan of the portion of the city of San Francisco here in controversy marked "No. 1." That map, we state, as the history of it, was prepared by the War Department for use before the Senate. The plaintiff has made two additions to it in order that it should accompany his Brief. First, he has drawn the meridian line, which the Court see in deep color in the midst of the plan, and which has been made parallel to the meridian line of the chart, which is on the left hand margin. He has repeated that meridian line so as to run through the northernmost point of San José, and he has depicted on the map the property of the plaintiff, Grisar, which the Court will find deeply colored. Otherwise, this is the map sent to the Committee of the Senate.

Your honors will see, by looking at this map, that the meridian line runs according to the reported agreement constituting a part of the case; the meridian line, which cuts the extremity of Point José, runs to the westward of the property of the plaintiff. We call attention to that fact here, inasmuch as on one of the maps in the transcript that fate

not only does not appear, but is apparently contradicted, which of course must be an error in the map itself.

And now, your honors, we shall beg to be allowed, with either of the small maps before you, to state to you the particular facts appearing in all the maps material to the present case.

The Court will observe that the curved chalk line on the black-board before me is the line of the mainland of the southern side of the Golden Gate. Here is the city of San Francisco, [pointing it out on the black-board]; here is the Point San José of the documents from the War Department, but which, and in much of the evidence and arguments, is called Black Point. The Court will understand that Black Point and the extreme southern point of San José are different names for the same locality. Here is Fort Point, and here is Point Lobos; here is the site of the old Presidio of San Francisco. There is Alcatraz Island; there is Lime Point, and there the curved line of the coast on the opposite side of the bay, [pointing out each object, and illustrating its position by a diagram on the black-board].

I must ask the attention of the Court to the exact words of the so-called reservation for they become material. The words are:

"In the Bay of San Francisco, California—

"From a point eight hundred yards south of Point José"—here is Point José, and then the description line takes its departure—

"From a point eight hundred yards south of Point José to the southern boundary of the Presidio, along the southern boundary to its western extremity, and thence in a straight line to the Pacific Ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point and Point Lobos," a pond you will see marked on the black-board; and you will also see the point where the rivulet flows into the channel.

So, then, the Court will now see that this first so-called

reservation is merely a description of a single line; it encloses nothing. The point of beginning is fixed by running a meridian line eight hundred yards from a point of departure. When you have run the meridian line eight hundred yards from the point of departure, you come to the new call or point of departure, and then all the so-called reservation consists of as description is the delineation of that single line. The description does not purport to comprehend anything either to the south or north of the line. It has no easterly line; it has no westerly line; it has no northerly line. It is one line only; or, if there had been the amplest possible wisdom about the act, which we shall see presently there was not, it might have been intended as the commencement of the description of a quadrangle, or a *quasi* quadrangle; but it is not. I repeat, it is plainly the running of a mere line from that point as determined by measurement and the compass, and from that point to a certain other point.

Mr. Justice DAVIS. Where is the property in dispute?

Mr. CUSHING. The property in dispute is here. [Pointing out its locality on the blackboard.]

Mr. STANBERY. All north of that base line.

Mr. CUSHING. Pardon me, Mr. Attorney General, I shall come to that presently. The line of the property in dispute is marked by chalk on the blackboard, and, as the Court will see, is eastward of that meridian line, so that this so-called reservation of 1850, even assuming that the Court shall invent for it an easterly line which is not in it, that easterly line thus invented will not comprehend within the supposed reservation the *locus in quo*. So the matter stood until we come to the second so-called act of reservation, and we shall now ask your honors to follow us on the blackboard for the purpose of seeing what that line was.

This act of the President of 31st December, 1851, purports to be a modification and reduction of the first so-called reservation, in so far as is material to the present case by assuming a compass centre at this Point José, finding a radius of eight hundred yards which brings us to the same point as before,

and then describing a semi-circle to constitute the reservation, so that the second so-called reservation is a semi-circular tract of land, having for its imperfect diameter the curved line of the bay running in a semi-circle around from one point of the bay to another point of the bay, and its place fixed by the meridian line for the distance of eight hundred yards radius, and this new line, as your honors will perceive, does comprehend the *locus in quo*, the estate of the plaintiff. It was not comprehended in the old line, even if there were a line; it is comprehended in the new one. Moreover, as the case finds, this new line,—that is, the semi-circle drawn from the Point San José as a centre,—also encloses various public edifices described, water-works, a woolen-mill, and others, and also, in like manner, this new line comprehends, as the case finds, the property of Mrs. Fremont.

I do not think at present it will be profitable to pay any particular attention to the sketches accompanying the transcript. I have endeavored to exhibit the facts on the blackboard and by speech correctly, and, of course, my brothers, who are vigilant in the interests of the Government, will correct me if anything has gone wrong. I will now dismiss these maps with asking the attention of the Court to a single one of them, and which is in the transcript marked "map No. 2, page 77."

Mr. LAKE. In the bill of exceptions, nothing is said about maps.

Mr. CUSHING. I beg your pardon. On page 13 of the transcript—

"The defendant's attorney then put in evidence the map accompanying the communications from the General Land-Office, which accompanied General Totten's report, referred to in the letter put in evidence, and which are hereto annexed."

I suppose these are the maps.

Mr. LAKE. You consider them annexed, but they were not. We have no objection, however.

Mr. CUSHING. I profess to have no knowledge but of what is in the record. I ask the Court to look at that map. It is described in the margin as "map referred to in Totten's letter, October 25, 1850." That verifies it.

Mr. LAKE. It is not in the bill of exceptions; it is referred to, however. But we have no objection to its being used if it is correct.

Mr. CUSHING. I am about to show that it is not correct. It is marked "map, No. 2, page, No. 77;" and on the right hand margin, "map referred to in Totten's letter, October 25, 1850."

Mr. Justice CLIFFORD. The map is referred to in the bill of exceptions, and therefore I suppose it may be regarded as annexed.

Mr. LAKE. I suppose it is inadvertently omitted from the bill of exceptions. We have no objection to its being referred to.

Mr. CUSHING. The only object we have in referring to it is to ask the attention of the Court to the fact that the straight line of the first so-called reservation running south-west and north-east is erroneous. The Court will find on this map the point San José; then eight hundred varas are marked off, and the Court will see the curve and the semi-circle. Then the Court will see the straight line of the first so-called reservation, running south-west and north-east; then the Court will see a faintly drawn line running nearly south from the extremity of the long straight line up to the coast. It is a very faint line, but there it is. I only desire the Court to understand that according to the express admission in the case found, and according to the undoubted fact, if that line which on this map stands far to the east of Point San José means to represent the originally assumed line of the reservation of 1850, it is an error.

Mr. LAKE. I can explain that. It is not so intended.

Mr. CUSHING. I only say that if so intended, it is an error.

Mr. LAKE. It is not intended for that. It is intended to represent a diagram which was prepared in contemplation of a settlement of the Benito Diaz grant, when the reservation was recommended to be cut down in that shape.

Mr. CUSHING. Then we are relieved from any further discussion on that subject by saying that my brother Lake concedes that that straight line is not to be understood as

indicating the easterly boundary of the reservation of 1850, but was put there for another purpose, *alio intuitu*, wholly immaterial to this question; for the eastern boundary of the reservation of 1850, as the record expressly finds in so many words, and as the authentic plans show, was to the westward of the plaintiff's house; a meridian line running through Point José leaves the properties which are here in controversy outside of the claim of the Government.

Mr. LAKE. I will state what I propose to admit. On page 13 of the transcript it is stated, "it was proved by the plaintiff that if a line is run from the extreme northern part of Point San José due south, those blocks would lie to the east of it." What I mean to admit is that that is not the line referred to; that it does not run from the centre. Is that all you want?

Mr. STANBERY. We claim that the line includes this property.

Mr. CUSHING. I understand now that my brothers mean to say that the meridian line described in reservation, No. 1, is not to commence with the apex of the promontory; that is to say, they deny that the apex of the promontory is the point.

Mr. LAKE. What I intended to admit was that the dotted line was not intended to be the line referred to in the bill of exceptions, in the passage which I just read.

Mr. CUSHING. I will then revert once more to the description of the reservation of 1850, and pray the attention of your honors to the language, to see who it is misapprehends the language, whether the plaintiff or the United States. The words are: "From a point eight hundred yards south of the Point José to the southern boundary of the Presidio, along that southern boundary to its western extremity, and thence in a straight line to the Pacific ocean." Now, my brother pretends that he, in his discretion, or in the discretion of the engineer officers, is to select some point of the coast, that point not determined by survey, or otherwise, not determined by any monument, not determined by any language of description, that he, in his discretion, is to select

some point to the eastward of the apex of Point José as the point of his departure. We deny that that is a possible or logical construction of these words. There is not much room for argument upon that question; we submit that the description is from *Point José*, and when that is taken as the *terminus a quo*, there is but one reasonable exposition of the language, and it is that it is the apex of the land at Point José.

Mr. Justice DAVIS. Will you state what the other side claim, and what you claim?

Mr. CUSHING. I really do not know what the other side claim. I now for the first time imagine the possibility of conflicting constructions.

Mr. STANBERY. I will state, if the gentleman pleases, what we claim. If we stood simply on the original reservation, which spoke of a line drawn from Point José, the gentleman's construction would be that we must go to the apex of that point. I say the words "Point José," as used there, mean the promontory, just as if the language were "living on Point José." Would the gentleman contend that that meant "living on the apex of the Point"? "Point José" there is the promontory, and that is shown by the further description including certain other points. Does it only include the apex of those points, or does it include the whole of those points?

Mr. CUSHING. I beg my brother to tell us where that line is?

Mr. STANBERY. What line?

Mr. CUSHING. The line he claims.

Mr. STANBERY. Wherever that promontory turns from the coast; that is the promontory; that is the "Point José," and living on that point anywhere is living on Point José.

Mr. CUSHING. I understand what "living" there is.

Mr. JOHNSON. Where do you run the line, Mr. Attorney General, according to your version?

Mr. STANBERY. From the commencement of the promontory, wherever it commenced. It is a fixed, known, determinate

line. The promontory is a fixed thing, and wherever that commenced the line commenced.

Mr. CUSHING. I will ask my brother in this new exposition of his case, which is not in the record, but in his assumption that a meridian line drawn from a point is to have an indefinite commencement of half a mile or a mile, and not a point,—I will ask him by what authority he assumes that the eastern side, of what he calls the promontory, is to be selected as the point of departure, rather than the western side of it? If the point of departure is whatsoever habitable earth can be called a promontory, it is as competent for us to say that the point of departure shall be on the western base of that promontory, as it is for the Government to say it is on the eastern base.

Mr. STANBERY. Because the eastern line would include the promontory, and the western would not.

Mr. CUSHING. There is no *inclusion* of the promontory, or of anything else, spoken of in the description. It is a radical defect of the description that it *includes* nothing, unless, as the Attorney General says, it includes Point Lobos, which point he seems to feel sure is there, at least a promontory. It commences in the air, at no geographical place, but at a supposed point eight hundred yards due south of Point José; and now my brother Stanbery is giving half a mile of extension, more or less, to that point of departure by the suggestion that, although the word is "point," yet point means a spacious promontory; that is to say, assuming that all the wide trend of the coast, which commences from a point south of a certain eastern indentation on the coast, and runs around to another indentation of the coast on the east, or any part of the same, is to be deemed the point of commencement. I submit to the Court that it is not worth while for us to waste time in arguing so monstrous a proposition; and if the Attorney General or Mr. Lake should, by any superfine ingenuity, be able to make impression on the Court of such a hypothesis, we feel sure my brother Johnson will be ready to furnish all proper response. And now we will proceed to discuss the merits of the case.

Those merits, on their face, are in the narrowest possible range of argument. They consist of the facts, found as a part of the special verdict:

First, That the plaintiff was in possession of the premises with color and claim of good title.

Second, That he was ousted by the defendant.

Third, That the defence of the defendant is authority under certain letters of the Secretary of War.

These are the three leading features of the case.

Mr. Justice DAVIS. When did the *ouster* occur?

Mr. CUSHING. On the 15th or 16th of June, 1865.

Mr. LAKE. The *ouster* was of all but the house of the plaintiff in 1864. He was not required to leave his house until June, 1865.

Mr. CUSHING. It is not material whether it was in 1864 or 1865; these respective dates do not affect anything. General McDowell came into command on the 1st of July, 1864, and he proceeded to take possession of the grounds of the reservation which included Mr. Grisar's place, but Mr. Grisar was left in possession of his house until the 15th or 16th of June, 1865. The taking possession, which was, if you please, formal and nominal in 1864, was actual in 1865. That, we think, is the true state of the case as to the house.

I say, then, to repeat my propositions:

First, That at the time of the *ouster* by the defendant,—whether in 1864 or 1865, is immaterial to any question of law,—the plaintiff was in possession under claim and color of good title.

Second, That the *ouster* purports to be maintained on certain letters of the Secretary of War or coming from the War Department, one of them a lettter from General Halleck.

Third, That if General McDowell had no justification of title in the United States under his orders, then he was subject to action of ejectment.

But these are the technical elements of the cause; and we proceed now to deal with the important considerations of law and of fact which these three propositions comprehend. And in doing this, in a portion of my argument, reference well be made to Mr. Cole's Brief. But, prior to doing that, inasmuch as in my judgment the action of this Court since that Brief was prepared has done much to smooth my path in argument, it will be convenient to commence with submitting to the Court sundry preliminary propositions, which propositions, as we humbly venture to think, cover the substantial merits of the cause, and we shall then proceed to apply them with aid derived from the Brief.

In the first place we ask the attention of the Court to the question of time here which will afterwards become material in the application of the considerations of law.

The first point of time is the admission of California as a State into the Union, which was on the 9th of September, 1850, as appears by the 9th United States Statutes at Large, p. 452.

In the next place San Francisco was incorporated as a city by an act of the Legislature of the State of California, passed on the 15th day of April, 1850. (California Laws, 1850, p. 223.)

In the third place, the earliest pretended reservation by the United States was made on the 6th of November, 1850, after the admission of California into the Union, and the actual so-called reservation upon which, as we think, the Court will be satisfied the Government is compelled here to stand, was on the 31st of December, 1851; not only being more than a year after the admission of California into the Union, but also more than a year after a legislative act of the State of California had recognized the exciting city of San Francisco as a continuing body politic under the laws of the State.

Then, in this question of dates, there is one other which is material, and that is the date of the act of Congress enacted for the purpose of carrying into effect the property stipulations of the treaty of Guadalupe Hidalgo, that is, the act of

March 3, 1851. It was provided in the 14th section of that act—

"That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican Governments, or the lawful authorities thereof"—

That is one *casus*. Next—

"Nor to any city, or town, or village lot, which city, town, or village existed on the 7th day of July, 1846"—

That is another category—

"But the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by, or in the name of such individual, and the fact of the existance of the said city, town, or village on the said 7th July, 1846, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim."

And then comes one more category of this act. as follows:

"And where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village."

Then, we have this series of facts, all of them anterior to the actual so called reservation, to the final act of the President of the United States through the War Department:

We have, in the first place, California as a State of this Union. In virture of the immutable established doctrine of public law fixed in the case of Pollard *vs.* Hazan, 3 Howard, and a dozen times since confirmed by this Court, we start with the doctrine, that on the day when this pretended reservation was made, the State of California was a State of the Union, possessing, retroactively, whatsoever right of municipal sovereignty, whatsoever rights of eminent domain, had appertained to the oldest States of the Union, like Massachusetts, New York, and Virginia; and we submit that we may take along with us as a fundamental doctrine.

We have, upon these dates, the second fact that, anterior to the time when this pretended reservation was made, the

city of San Francisco had been recognized by the municipal sovereignty to which it appertained, that is, the State of California, as a continuing city, preëxisting and continuing, not a new city created.

Then we have the act of Congress for the adjudication of private land claims in California, which (abridging it now so far as my argument requires it to be stated) presents to us these two legal points: first, that the city of San Francisco was recognized by Congress in virtue of the stipulations of the treaty of Guadalupe Hidalgo as being entitled to take, claim, and hold whatsoever lands belonged to it by the laws of Mexico and Spain, and to take, claim, and hold them as the city of San Francisco, the successor of the preëxisting Pueblo of San Francisco; and finally that that same act provides, *totidem verbis*, in express enactment, that any lot-holder under that city of San Francisco shall be entitled, as of right, to hold by a tenure of title granted to the city of San Francisco. I beg the Court to allow me to re-read that provision, and then to ask its attention to a portion of the transcript pertinent to that inquiry.

"That the provision of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican Governments."

What is the effect of that enactment? It is that the tenant of such a town lot has no occasion to go to the Commissioners for adjudicating private land claims. There is a statute enactment that he obtains his muniment of title not in his own person. He has no occasion to put forward his own person to obtain that muniment of title from the United States, but he obtains it in virtue of the right he possesses as a donee or grantee of the City of San Francisco, substituting now a specific name for a generality. Here he obtains his rights as the donee of the city in virtue of the authority given by Congress to the city to represent, in its application to the Commissioners, not only its own immediate subsisting rights as a city, but the rights of all its donees under it as a city.

Now, we pray your honors' attention to a single phrase in the case, found on page 8 of the printed transcript, where the Court will see that the exceptions find that the plaintiff's title by, from, and under the city of San Francisco is regularly deraigned, with reference not only to the famous ordinance of 1855, but also to the act of the State of California of March 11, 1858. That act will be found on Dwinelle, page 216, and in the statute of the State of California for 1858, page 68, chapter 52. I refer to it merely as constituting the statute source of title in aid of the city source of title which the tenants here derive from the city of San Francisco.

Now, may it please your honors, upon the *prima facie* case which we thus present as plaintiff, of a city title guarantied by Congress, of a statute title from the State of California, we have to ask your consideration to certain positions, which seem to us to determine the rights of the plaintiff against any possible defence of the defendant.

My first proposition is, that the quality of the title, the question whether it be private property or not, is wholly independent of the question whether the person holding the title be a natural or an artifical person, a man or a corporation. That is to say, the city of San Francisco may and can as well hold land—whether absolutely or in trust is immaterial to that question—as an individual person.

Second, it does not matter if the corporation holds in trust for its members, still it is property, and private property, as distinguished from public domain.

Next, it does not matter if that property thus held by a city in its corporate capacity in trust be exempt from levy; for we have the familiar case in the laws of many of the States, if not of most, of a homestead, sometimes of great value, being wholly exempt from levy, but not being the less property; nay, being privileged property in the hands of its owner.

Next, whether a title at its inception starts from the sovereign power as grantor of a parcel of public land, in the form of a concession or patent, or in the form of a special

legislative donation, or in the form of a general grant, is wholly immaterial. All these are questions of form or of evidence; and there may well be a title held by a private person, under our or any other form of government, derived from a special executive act called a patent, from a special legislate grant, or from a general legislative grant; and in each case, so far as regards any question here, is of the same gravity, character, and respect. For instance, our common form of grant (we are constrained to go into that to preclude all question of cavil in regard to the form of this title) is, we admit, by executive letters-patent of a parcel of the public domain; but we submit that it is within the ordinary form of our legislation, and it does frequently happen, that a title to an individual person is conferred by legislative act, and is of just as high character as if conferred by letters-patent, and in a moral point of view is higher. We refer, for example, to the act of the 28th of December, 1824, in favor of General Lafayette, (6 United States Statutes at Large, p. 320,) which reads as follows:

"That there be granted to the said General Lafayette, and his heirs, one township of land, to be laid out and located under the authority of the President in any of the unappropriated lands of the United States."

We submit that that is a perfect private title as well as if it had been by patent. And we proceed to take a further step and say that a title, held either by an individual or by a corporation, is not the less a perfect title, because there may not be a patent for it. This is important in relation to what shall afterwards be said of the title to public lands; and, in proof of this proposition, we refer among many examples to one, a pertinent one of the legislation of the United States in regard to the school section. By referring to the ordinances of 1785 and 1787, as printed in Bioren and Duane's edition of the laws of the United States, vol. 1, pages 565 and 573, you will find that the school section grants began thus:

"The lot number 16, in each town or fractional part of a township, to be given perpetually * * * for the maintenance of public schools within the said township."

We submit that that statute donation vests the title of each sixteenth section in the public schools: the fact that it is granted in trust, and that trustees are to be otherwise appointed, does not cause the condition to cease to be that of a donation in fee; a donation it is true in trust, but nevertheless a perpetual and a perfect title. So, also, as I shall presently have to argue to the Court, if we find a statute donation, by the laws of Spain and Mexico, in identically the same words of grant that we find here to General La Fayette, and to schools,—if we find a donation of four square leagues to the pueblo of San Francisco,—we submit that we shall have justified the title claimed under that by reference to the analogies of our own jurisprudence and legislation.

We have to submit one other preliminary proposition, which is, that in virtue of the stipulations of the treaty of Guadalupe Hidalgo, as authenticated and fixed by the acts of Congress and by the decisions of this Court, we may lay down this doctrine, namely: wheresoever a land title in California shall have been finally adjudicated, a land title founded either upon a Spanish or a Mexican grant,—and whether a legal title or an equitable title, and whether an absolute title or a title in trust,—wheresoever on a Spanish or Mexican grant, a title shall have been adjudicated, that title dates as property back to the time of its inception by the act of Spain or Mexico. The verification of it as property, the segregation of it in fact from public domain, is not fixed until the decree of the Court or the other forms of law may have been observed; But, when so verified, then we submit the determination of the Court that there is a title, either upon an inchoate or upon a complete grant, has the legal effect of determining that that was a title at the date of the act of the Government of Mexico or Spain, from which it took its origin.

For instance, to illustrate,—this Court has decided,—and it constitutes the leading case, the pioneer case of adjudications here,—that the Mariposas was the property of General Fremont. That decision was ten years after the grant; but we submit as a doctrine of law applicable to the subject, that

when the validity of that grant had been verified in the forms of law, the verification drew after it the legal result that it was private property on the day of its grant; the completion of the title papers by the Mexican Government made it private property, as against the public domain, whether of Mexico or of the United States.

Take another case,—the case of the Fossat grant, for instance,—or any other of those indisputed Spanish or Mexican titles,—we submit that when the title has been verified in the forms of law, that verification retroacts, dates back to the conclusion that it was private property from the time of the grant.

If these propositions may be conceded, then we have only the further preliminary proposition, that the United States never possessed any right of eminent domain as respects *private* lands in California. The eminent domain of such lands vested in the State of California in virtue of the established public law of the United States; and if any public power to-day, or in the year 1865, or in the year 1851, or in the year 1850, at any time after the admission of California into the Union, could by its own act expropriate private property in California, that power was the State of California.

We know no authority of expropriation which the United States possess, directly applicable, by its own motion, to private property in any State. Its power only reaches to public domain; and that is not expropriation. There is no expropriation of public domain. When public domain is reserved by the President, all which happens is that the President, under a statute power, omits to sell such parcel of the public domain; but it is not a fact of expropriation. We are dealing now with expropriation; and we repeat that the United States possess no power of expropriation of private property directly by its own act within a State of the Union. If it needs to expropriate, it goes to the legislature of the State to obtain permission to expropriate according to its statutes.

We are not now discussing the question which we shall have to consider bye and bye, whether under a military necessity, real or fanciful, the United States may seize property for temporary purposes, military or civil. We are dealing with the question of expropriation as property. We admit the United States may seize for temporary purposes. We deny that any power exists in the United States to take away and acquire property, except through the agency of the particular State. So, if an act of the United States, professing or pretending to get or keep title in California could be applied to anything, it could only be applied to the public domain, and could not be applied to private property. Could the United States, under any form of action of its own, independent of the State of California, take possession for any purpose of one-half of the estate of Mariposas, or one-half of the mine of New Almaden? Has any such right ever been pretended? Never, we submit. If the Federal Government seeks to expropriate private property, it proceeds in forms of law. It must do it by statute. It does not do it in a State in virtue of its own eminent domain. The eminent domain of private lands in the State is not in the United States, but in the State. There is no eminent domain of the United States, in any of the old States, or in private property in any of the new States.

In the front of this question stands the Constitution of the United States, which contains two pertinent provisions:

First, The provision that "The Congress shall have power * * to exercise exclusive legislation * * over all places purchased by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

Here the phraseology is very significant. It says nothing, it intimates nothing, of any places taken for the use of the United States in virtue of any pretence of eminent domain. It does not contemplate the possibility of acquiring property in land by such means. It looks only to acquisition by purchase, and purchase with the consent of the particular State.

Over such purchased places within the limits of any State, the United States are to exercise jurisdiction. But there is no provision here or anywhere else in the Constitution, in virtue of which the United States can have or hold jurisdiction over a place taken by its order under pretence of eminent domain. If, which we deny, the United States have any power to take in virtue of eminent domain, then it can never get jurisdiction thereof as against the particular State: which serves to show that the Constitution, as its language plainly implies, intended to deny to the United States any right of eminent domain as respects private property within a particular State.

The other pertinent provision is that of the fifth article of amendment, in the words, "Nor shall private property be taken for public use without just compensation."

This article of amendment must be construed with relation to the pre-established articles of the Constitution itself. It was manifestly intended to limit subsisting powers, not to impart new ones. We have already shown that the United States cannot have *jurisdiction* of a place within a State unless on purchase with consent of the State. We have inferred that the United States cannot, by its own act, expropriate private property in land, otherwise than through the instrumentality of the State. Hence the present article must be regarded as applying either to *personal* property taken by the United States without consent of the owner, or to *real estate* when taken with the consent of the particular State within whose limit it lies.

These conclusions derive confirmation from the well-known fact of the exceeding distrust with which even the limited concession of possible jurisdiction to the United States within the limits of a State was regarded by the framers of the Constitution. (Story's Com., § 1219.)

This matter called for practical solution in the first Congress of the United States. The legislators of that day were the authors of the Constitution, and may be presumed to have understood its language and purposes. The Constitution had originated in commercial interests, and commercial in-

terests pre-occupied the attention of the first Congress. Accordingly, the 9th statute in the statute book is an act for the establishment and support of light houses, beacons, buoys, and public piers. Here was an inviting case for the exercise of the right of eminent domain, if any such right belongs to the United States. And the "commerce power" would constitute just as good a head under which to seize as the "war power." Did Congress imagine it could take as eminent domain? No; on the contrary, it proceeded to enact as follows:

"Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all expenses which shall accrue from and after the 15th day of August, 1789, in the necessary support, maintenance, and repairs of all light-houses, beacons, buoys, and public piers erected, placed, or sunk before the passing of this act, at the entrance of, or within any bay, inlet, harbor, or point of the United States for rendering the navigation thereof easy and safe, shall be defrayed out of the Treasury of the United States; *Provided, nevertheless*, That none of the said expenses shall continue to be so defrayed by the United States after the expiration of one year from the day aforesaid, unless such light-houses, beacons, buoys, and public piers shall, in the meantime, be ceded to and vest in the United States by the State or States respectively, in which the same may be, together with the lands and tenements thereunto belonging, and together with the jurisdiction of the same." (U. S. Laws, vol. 1, p. 53.)

In accordance with this act has been the conduct of the Federal Government from that day to this. The Court will find in Bioren and Duane's edition of the laws of the United States, vol. 1, p. 664, an enumeration of all the sites for light-houses acquired by the United States in the period between 1789 and 1815, being in every case by purchase. And we assert, without fear of contradiction, that so it has been in that respect down to the present day.

The history of the military and naval establishments of the United States affords similar illustration of the true construction of the Constitution.

Under this head the commencement of legislation is the act of March 20, 1794, entitled "an act to provide for the defence of certain ports and harbors in the United States," which, after enumerating the points of fortification, where, in fact, at each one of which, forts already existed, the act proceeds as follows:

"That it shall be lawful for the President of the United States to receive from any State (in behalf of the United States) a cession of the lands, on which any

of the fortifications aforesaid, with the necessary buildings, may be erected, or intended to be erected; or where such cessions shall not be made, to purchase such lands on behalf of the United States; *Provided*, That no purchase shall be made where such lands are the property of a State." (U. S. Laws, vol. 1, p. 345.)

The Court, in this enactment, will mark the concluding phrase, that no purchase shall be made *where such lands are the property of a State*. This qualification had reference to the great question of that time, namely, the Federal indebtedness of the several States. Thus it happened that by a subsequent act, that of June 23, 1797, (U. S. Laws, vol. 1, p. 521,) the indebted States were invited to expend the amount of their indebtedness in the construction of fortifications for the defence of their respective ports and harbors. Subsequently, by act of May 3, 1798, (U. S. Stat., vol. 1, p. 554,) while the preceding contract of set-off is renewed, an additional or auxiliary contract is propounded to the States, to the effect that "the *fortifications*, for which the whole or any part of the expenditure shall be so allowed and credited as aforesaid, with their privileges and appurtenances, shall be, and shall be declared and established as the property of the United States while maintained by them."

In the cases contemplated by this act, the United States would have no interest in the land, and no right to jurisdiction: the Government would hold the *fortifications* as a sort of lessee or licensee of the respective States.

We cannot stop to enquire how much, if anything, was done in virtue of this statute. Suffice it to say, that during the first twenty-five years of the Government, we have the means of showing that the United States proceeded to take for fortifications and other military or naval works by purchase alone, without setting up any pretence or claim of eminent domain: as appears from the careful "abstract of lots of land, and of jurisdictional and other rights, either purchased from individuals by, or ceded by the States mentioned to, the United States, for military purposes, &c., from the deeds recorded in the office of which, the abstract has been made," printed in Bioren & Duane's edition of Laws of U. S., vol. 1, p. 680. See, also, the naval sites enumerated in the

same work, vol. 1, p. 679. And we venture to assert in this respect also, that, down to the present time, military and naval sites have continued to be procured by purchase only, and that no one case has occurred, in which expropriation, that is, forced transfer of property from another person, individual or corporate, for any military purpose, has been effected under pretence or claim of the eminent domain of the United States.

There have been cases in which the United States, having occasion to obtain many parcels of private property, for some particular Federal object, have assumed that the object must be accomplished through the instrumentality of the particular State. Of this, the most convenient example is that of the "Washington Aqueduct," because the constitutional relations of the subject on that occasion had to be discussed by the then Attorney General of the United States. See Opinions, vol. 7, p. 115.

And we take it for granted that Mr. Stanbery and Mr. Justice Clifford, at least, will be content to have us attribute so much of proper authority to the official opinions of an Attorney General, as may justify us in citing two other opinions, in which the precise question is touched, directly or indirectly, viz: in vol. 7, p. 571, and vol. 8, p. 333.

There is still another act of Congress which lends support to the doctrine here maintained, namely, the joint resolution of September 11, 1841, which requires the Attorney General of the United States—

"To examine into the titles of all the lands or sites which have been purchased by the United States, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom-houses, light-houses, or other public buildings of every kind whatever, and report his opinion as to the validity of the title in each case to the President of the United States."

The same act contains further provisions to the same effect, as follows:

"That no public money shall be expended upon any cite or land hereafter to be purchased by the United States for the purposes aforesaid, until the written opinion of the Attorney General shall be had in favor of the validity of the title, and also the consent of the legislature of the State in which the lands or site may be, shall be given to said purchaser."

We encounter suggestive commentary on this subject. Thus, Rawle says:

"When a fortress within the acknowledged limits of a State was surrendered under the treaty of 1794 with Great Britain, and was afterwards constantly possessed and garrisoned by the United States, but was never purchased from the State by the United States, or ceded to the latter by the former, the United States do not possess the right of exclusive legislation, or exclusive jurisdiction over such fortress, but crimes committed therein may be punished under the laws and by the Courts of the State. To give the United States exclusive legislation and jurisdiction over a place, there must be a free cession of the same, for one of the purposes specified in the Constitution. They cannot acquire it tortiously or by disseisin of the State, or by occupancy with merely the tacit consent of the State, when such occupancy is as a military post, though obtained after a treaty by which foreign garrisons were withdrawn from our posts.

"And the rule is the same, although the title to such place be vested in the United States by purchase from individuals, and it has been occupied by them as a military post; for if there has been no cession by the legislature of the State to the United States, the right of legislation and jurisdiction over such places remains exclusively in the State where it is situated." (Rawle on the Constitution, p. 238.)

See, also, Sergeant on the Constitution, chap. 30; Kent's Com., vol. 1, p. *429.

There has been much discussion concerning actual or possible conflict of jurisdiction between the United States and this or that State, arising out of occupation of land for forts or other Federal objects, within such State. In every one of these cases there had been purchase by the United States. Not one of them sets up right founded on taking as of eminent domain. See:

The United States *vs.* Ames, 1 Woodb. & M. 76.
The People *vs.* Godfrey, 17 Johns. R. 225.
Commonwealth *vs.* Young, 1 Hall's Journal of Jurisprudence 47.
United States *vs.* Cornell, 2 Mason R. 60.
Commonwealth *vs.* Clary, 8 Mass. 72.
Mitchell *vs.* Tibbetts, 17 Pick. 298.
Dickey *vs.* Turnpike Road, 7 Dana 113.
7 Opin. Atty. Genl. 628.
Opin. of Judges, 1 Met. 580.
Commonwealth *vs.* Alger, 7 Cush. 82.
United States *vs.* Railroad Bridge Co., 6 McLean 517, 535.

If there be any statute, any adjudication, any authoritative opinion, to the contrary of this, we are unaware of its existence. We concede that the United States are actual *proprietors* of all such land as remains unappropriated within the limits of any State of the Union, constituted on ceded territory, whether through original cession by the old States, or subsequent cession by any foreign Government. We concede that the United States possess the rights of eminent domain as respects land still occupied by the Indians in any of the newly acquired States or Territories. (Mitchell *vs.* United States, 9 Peters 711.) But the United States have no special jurisdiction over Indians in Maine, Massachusetts, New York; and the eminent domain of the land there resides in the respective States, and not in the United States.

Now, it has been settled in the case of Pollard *vs.* Hagan, 3 Howard 212, and in the cases of Pollard *vs.* Kibby, 9 Howard 471, Hallett *vs.* Beebee, 13 How. 25, and the various cases confirmatory thereof, that, on the day of the admission of any new State into the Union, the right of eminent domain, which had been temporarily held by the United States, passed to the new State, and nothing remained to the United States except their rights as proprietors of any residuum of ungranted public land within such State.

May it please your honors, it seems to have been assumed, and we touch in passing upon that point here with all possible respect, as we feel sure Mr. Justice Field will know, towards him, that as to the private property of a town, the Spanish Government or the Mexican Government exercised functions of eminent domain different from the functions which it exercised in regard to the private property of individual persons.

We submit first, that there is no such distinction in the Spanish or Mexican law; that the method in which the Government obtains property, which it desires for any public use, in Spain or Spanish America, is precisely the same, whether that property be the property of an individual person, or of a town or pueblo.

In the next place, as well with regard to a private individual as with regard to a town or pueblo, neither the Mexican law nor the Spanish law provides any method, by which the Crown, or the Republic, or the State, or whatever form of sovereignty applies to the subject matter, may take, except by systematic regulated expropriation with compensation. The law of Spain and the law of Mexico differ only from the law of the United States in the fact, that the methods are defined in the Mexican and Spanish law with precision and certainty, whilst they are left to construction and precedent in the laws of the United States.

We refer your honors on this point to one book, with which several members of the Court are familiar, namely, Lares' Derecho Administrativo of Mexico, where, in his eleventh lecture, he fully and circumstantially shows that the Mexican Government possesses no power to take private property, whether that private property be the property of a man or of a pueblo, except by such forms of law as involve not merely verification of the thing taken, without a margin of a mile or two, as our brothers claim here, more or less on one end, and three or four miles more or less on the other, and appraisement and compensation for its value.

We might refer to various other books to the same point, in the jurisprudence both of Mexico and of Spain. We speak of the latter, because it has happened once in this Court that counsel, conceding the laws of Mexico in this respect to be against them, have sought shelter under a revolutionary decree of the Cortes of Spain, that of 1813. That was in the case of the United States *vs.* Vallejo, 1 Black, 541. Your honors on that occasion very conclusively disposed of the decree in question; and the opinion delivered by Mr. Justice Nelson in the case will suffice we trust to prevent the same decree being relied on here against the pueblo rights of San Francisco. However that may be, we foreclose any adverse authority from the laws of Spain on the subject of political expropriation of property, whether of a person or a pueblo, by the latest statement of the doctrine,

in the Dictionary of Administrative Law by Cos-Gayon, (1861,) p. 539, which we translate as follows:

"EXPROPRIATION.—No person can be deprived of his property save for cause of public utility, when the particular interest being found in conflict with the general interest of the State, the former is held to be obliged to yield in favor of the latter. * * * * * The right of property being inviolable, no *individual, corporation, or establishment of whatsoever kind* can be obliged to cede or alienate that which belongs to him (or it) as property for works of public interest without the following requirements preceding, viz:

First, Solemn declaration that the projected work is of public utility, and competent permission to execute it.

Second, Declaration that it is indispensable that the whole or a part of the property be ceded or alienated in order to execute the work of public utility.

Third, Appraisement of that which has to be ceded or alienated.

Fourth, Payment of the price of indemnification."

Although the author here refers to a statute of Spain, yet, if your honors should, doubting, have occasion to explore the question as we have done, you will find that the statute which Cos-Gayon cites is declaratory of pre-existing law, which is found to permeate the entire jurisprudence of Spain, beginning with the Partidas and coming all the way down. It is set forth in great detail in the older works of Colmeiro and Dou, for instance, familiar books on administrative law of still higher authority than Lares.

So, we presume to affirm that neither Spain nor Mexico possessed any power of expropriation relatively to the pueblo lands of San Francisco, which they did not possess relatively to the private estate of any individual; that they possessed no right of expropriation for any alleged public use whatsoever, except upon appraisement and indemnification. That is to say, the supposition, which we have to encounter continually in the course of this case,—that the United States has, in respect to private property in California, inherited powers of expropriation from Mexico, which do not exist by our law,—is without foundation in fact.

We deny that any such power of expropriation was transmitted to us. On the contrary, we suggest to your honors that the reverse is the doctrine; that wheresoever a Spanish or Mexican title comes into existence under the laws of the United States since the year 1848, that is to say, since the date of the treaty of Guadalupe Hidalgo,—wherever any private

title comes to the United States charged in its terms with peculiar servitudes of the Spanish law in the public interest,—such title throws off those servitudes, is discharged of them, on becoming an American title. Among many possible illustrations of this, it needs to refer to but one. It is, that whereas by the Spanish law and the Mexican law all private property was subject to the onerous servitude, as an element of the sovereign right of eminent domain, of being subject to mineral denouncement, so that any private individual might denounce a mine upon my property, and take possession of that mine and work it in despite of me, yet we have it thoroughly adjudicated, if not by any decision of your honors, yet by so many decisions of the Courts of California, and upon doctrines so thoroughly accepted and so fully in consonance with our ideas of jurisprudence, that nobody doubts, that a private land title in California derived from Mexico is no more subject to this servitude of the Hispano-American law, than a land title in the State of Maryland derived under Lord Baltimore.

So we repeat, that, in the first place, no such extravagant and singular right of eminent domain as these theories suppose did exist in Mexico, and second, if it did exist, it would have been extinguished by the Mexican title becoming on confirmation an American title, with all the qualities of a fee belonging by the common law to titles in the United States.

May it please your honors, it may have been tedious to listen to the presentation of these premises of the cause; but the Court will find that in taking up the case from this point of view, we shall have greatly abridged the general argument. And assuming, as in good faith we do, the doctrines which have been thus enunciated, and which, we think, are substantiated by the authorities, and by reason, we now come to our application of these doctrines to the present case.

And our first general proposition, which covers the details of points 2, 3, 4, and 5 of the Brief, is that the city of San Francisco is entitled, as of the 7th of June, 1846, to all the rights of a pre-existing Mexican pueblo, and as such, is in law the donee of four square leagues of land of legally defined or definable limits, including the *locus in quo*.

That, we submit here in this Court to-day, is settled law, not to be controverted. It does not require argument in the affirmative: it does not admit of argument in the negative. We refer, in substantiation of this, to extracts from the unanimous opinion of this Court, in Townsend *vs.* Greely, 5th Wallace, 336, as follows:

"By the laws of Mexico in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this Continent. These laws and ordinances provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land.

"It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the Government of the country."

That, we understand to be the *ultima ratio* of your honors. And now, we beg the Court to apply that to this case. Pueblos were entitled by the law of Mexico to four square leagues of land. We will not hypercritically inquire what was the precise nature of that title; but we do find, beyond peradventure, as of the essence of such title, that it was a right to alienate portions of the land to its inhabitants for building or cultivation. Standing now upon this decision of this Supreme Court so recently pronounced, its unanimous voice, we find it to be determined that whatsoever qualification, if any, other than the quality of a trust, may be found in a pueblo title, the pueblo title does involve a right to communicate title to lot holders; and that determines this case. So, we say, upon the face of this determination of the Court, it would seem that, however there would be doubt, if there be any,—we are not yet admitting that,—as to the quality of the title of the pueblo,—yet that that title had in it adequate virtue to give a fee to a lot holder; and that is all that the

exigencies of this case require. A fee to a lot holder derived under a pueblo, this Court recognizes as an indubitable integer of the power of a pueblo under the law of Mexico.

We know, your honors have guardedly described these pueblo titles. And far be it from us to criticise an opinion of this Court, which refers with expressions of reserve to incidents of the subject not irretrievably involved in the point adjudged. We are all aware that your honors are constrained to give reasons for the satisfaction of the bar and of the community. We are aware that every general proposition decided by the Court has akin to it conditions, which may or may not turn up in another case. Hence, looking at the subject from both points of view, we should be mindful not to exaggerate the importance of a general statement of the Court, or unduly to take away from the force of such a statement. Hence, we do not criticise, therefore, but applaud rather, the qualifications, which the Court introduced into this opinion, as the circumstances of the path of reasoning through which it came to its conclusion.

It is only because the Court, with strict propriety and justice, introduced qualifications with reference to things not before it to be determined then, that we now ask your honors to deal with one or two of those qualifications as a part of this case.

The primary thing we submit to your honors in this relation is, that the title of the pueblo of San Francisco, and that of other pueblos, is a statute title,—a statute title conferred in the same words of sovereign command, a statute title in the imperative mood, a statute title in language of comprehensive and positive grant,—in just the same sense as, and with exact similitude of expression to, the statute titles which we have considered in our introductory observations,—the statute title of the schools of a township to its sixteenth section,—the statute title of General Lafayette to a township of land,—and the various specific statute titles which now are so numerous for diverse public uses, colleges, railroads, canals,—and in general grants to the States of swamp lands, and so on,—which permeate the acts of Congress. I

say we are now about to show that the statute title of the city of San Francisco to its pueblo lands is enacted in the same terms of sovereign command and of peremptory absolute grant as the sixteenth section is to schools. I beg your honors' patience, for a moment, for the reading of the pertinent laws from the "*Leges de Indias*," which are referred to in all the Briefs.

Mr. Justice CLIFFORD. I am afraid I do not quite understand your proposition. Do you contend that the authority of the Ayuntamiento over the lands of the peublo was any more than the authority of the Governor? Was it not simply an authority to grant vacant lands?

Mr. CUSHING. We contend that it is much more than what your honor propounds; for, as there will be occasion to remark presently, the colonization law, in express terms, prohibits the Governor from granting pueblo lands.

Mr. Justice CLIFFORD. Yes; but he could grant vacant lands.

Mr. CUSHING. Vacant lands and pueblo lands are placed in contradistinction in the colonization decree of Mexico. Vacant lands are lands of the public domain.

First, the Governor could grant vacant lands, but not pueblo lands; for the latter are not vacant, are not public domain. 'The objects of this law are those national lands, which, not being private property, nor belonging to any corporation or pueblo, can be colonized'—which implies that the pueblo lands are not vacant lands.

In the second place, there is in the departmental decree of the public domain, as we have been accustomed to call it here at the bar, express provision how title is to be got inside of the pueblo, by an act of the prefect with appeal from him to the political power. 'The prefects will regulate administratively and conformably to the laws the allotments of the common lands in the pueblos.' (Arrillaga, Rec. p. 1837, p. 217.)

So then, by the colonization and departmental ordinances and regulations, pueblos are defined and determined not to be vacant lands,—not to be public domain,—not to be colonizable lands.

Mr. Justice FIELD. Allow me to ask where the authority of the Governor to make the Andrade grant is derived?

Mr. CUSHING. I thank your honor for that suggestion, and reply: In the first place, the land, as we conceive, was not a part of the pueblo lands, as described in the case of San Francisco *vs.* the United States. Our brother Carlisle spoke on the point in his argument of that cause. We had conferred together inquiringly in that respect, apprehending that possibly the title might be criticised on some such ground. But as no such question appeared in the record,—as it was not made in the Court below,—and as it was to be assumed that Judge Hoffman exhausted the case,—we inferred that the question,—pueblo lands or not,—was inapplicable to the case,—and we assumed that if there were possible room in the case for the question to be made, there must have been some answer to it so conclusive that neither counsel nor Court deemed it useful to refer to the point;—and as the record did not bring up that question in any form either of fact or of argument.

Mr. STANBERY. But the record shows the question. The record shows that the mission, if you call it a pueblo at Yerba Buena or any point north, was within three miles—not four leagues, but three miles.

Mr. CUSHING. I submit to your honors that my brother's assumed fact is merely inferential and argumentative. The question,—pueblo limits or not,—is not touched in that case. My brother Carlisle and myself looked over that record carefully, to see whether it was presented. Although it did not devolve on me to argue that part of the case, it did devolve on him; and your honors will remember that, with his usual logical precision, as well as competent fulness of argument, he did deal with that precise question, and dealt with it on the premises that *de non existentibus et non apparentibus eadem est ratio*. There is no proof in the transcript, and no suggestion in the argument, and no intimation in the opinion of Judge Hoffman, that any such difficulty was applicable to the claim of Andrade.

To return, then, to the present case: We say that whereas the pueblo lands were, by the command of the colonization

statute and the *reglamento* under it, not colonizable lands, not vacant public domain,—and whereas there is in the departmental decree legislation in detail as to how title may be acquired in a pueblo, under the pueblo itself, through the official instrumentalitity of the Prefect,—we think that constitutes a response to the question of his honor, Mr. Justice Clifford.

We come then to submit what we think proves the absolute statute title of the pueblo, reading from the Leyes de Indias, book 4, title 5, law, as follows:

"That the lands and provinces which shall be selected to people shall have the following qualities:

"We ordain that on its having been resolved by any persons to people any province or territory of those which are now of our obedience, or shall be discovered hereafter, the peoplers shall have consideration and attention that the region of country be salubrious, observing whether the natives there live to mature age, and the youth be of good complexion, disposition, and color; if the animals and herds are sound and of competent size; and the fruits and the means of subsistence good and abundant; and the lands suitable for seed time and harvest; if poisonous and noxious things grow there; if the sky is of good and happy constellation, clear and benign; the air pure and sweet, without impediments or alterations; the temperature without excess of heat or cold, and in case of declining one or the other of these qualities, then to choose the cold; if there be pasturage for flocks, mountains and woods for fuel, and materials for houses and edifices; much and good water for drink and irrigation; natives to whom the Gospel may be preached, as the final motive of our intention; and all these conditions or the principal of them being found to concur, let them proceed to the peopling, observing the laws of this book."

Now come the conditions, law 6:

"The conditions for a town of alcaldes with the ordinary jurisdiction and councilmen shall be agreeable to this law.

"If the nature of the tract of land allow of the settlement of some town of Spaniards with a council of alcaldes of the ordinary jurisdiction, and there be some person who undertakes by contract to settle it, let the agreement be made under these conditions,—"

Our brother Lake says it is in the subjunctive mood; but, plainly, it is in the imperative,—the language of command.

"That within the period of time which may be assigned to him he must have at least thirty settlers, each one provided with a house, ten breeding cows, four oxen or two oxen and two steers, one brood mare, one breeding sow, twenty breeding ewes of the Castilian breed, and six hens and one cock; he shall also appoint a priest to administer the Holy Sacraments; the first time he shall select him, but afterwards, the appointment shall be subject to our Royal Patronage; and he shall provide the church with ornaments, and the things necessary for Divine Worship; and shall give bonds for the performance of all this within the time

agreed upon; and if he should not comply with his obligation, he will lose whatever he may have constructed, wrought, or garnered, to be applied to our Royal Patrimony, and will furthermore incur the penalty of one thousand pounds of gold for our Treasury; and if he should comply with his obligation, let them be given to him four leagues of extent and territory in a square or prolonged form according to the character of the land, in such manner that if surveyed there shall be the four leagues in a square, with the condition that the limits of said territory shall be distant at least five leagues from any town, city, or village of Spaniards previously founded, and so prejudice be done to any pueblo of Indians or individual person."

The language is, "let there be given to him four square leagues." This your honors will see is in the case of a contract for a pueblo, an individual enterprise. And then law 10 says:

"If there should be no private contractor for a settlement, but only individual citizens who are married men, let them have leave to found a settlement, provided they are not less than ten.

"When any private individuals shall agree to form a new settlement, and for that purpose there shall be a number of married men, let leave be granted to them, provided they be not fewer than ten married men."

Our brother Lake argues that it means "leave *may* be granted to them." We do not think that is the meaning of the statute. It is correctly rendered by Mr. Dwinelle. We translate,—*se les den cuatro leguas*,—in the imperative, "be there given to them;" "let leave be given them;" *se les de licencia; deseles termino y territorio*, "give to them extent of lands and territory according to what has heretofore been provided."

"And *we grant them* (*les concedemos*) power to elect among themselves alcaldes with the usual jurisdiction and annual officers of council."

We submit that here is a statute grant precisely analogous to the statute grants by our statutes in the same form of enactment; and a grant, in no way distinguishable as virtue or as quality from statute grants made by the United States.

But fortunately we are not introducing anything strange here. There is nothing paradoxical in this. It is no novelty. It is not *novus hospes*.

May it please your honors, so long ago as 1836, the whole question, in all its length and breadth, was argued before

this Court as elaborately as any question was ever discussed, and by counsel of preëminent ability on both sides, of exhaustive knowledge of jurisprudence, both Spanish and American; and the whole subject was considered by the Court with aid of all the illumination it was possible for those minds to throw upon it, such eloquence and learning as rarely honor this generation. We allude now, as your honors will have anticipated, to the case of New Orleans *vs.* the United States, 10 Peters, 662. The Court came to the conclusion without misgiving, without doubt, without qualification, and in a question which was a square and direct issue between the city of New Orleans and the United States; and they announced that conclusion in language of detailed exposition, which covers the whole question; and determined it under citations from the very laws we are here referring to,—the Leyes de Indies, the Novisima Recopilacion, the Partidas, and various other text-books and commentaries of Spain and Spanish America. We are, therefore, on familiar ground; one is half ashamed to refer here now to these foreign authorities on the present question; for they are all to be found in that case clearly presented to the Court; and the Court accepted them as determining that, according to the doctrine of the Hispano-American law, a pueblo was entitled, as of right, by statute grant, to four square leagues of land, such land ceasing, on the formation of the pueblo, to be public domain of the Crown, and of course never became saleable or reservable public domain of the United States. And thus New Orleans held against the United States.

And so the question remained apparently settled, passing into doctrine no longer to be debated, until the same question came up in the year 1844, in another portion of Louisiana, to wit, in what is now Missouri, in the case of Chouteau *vs.* Eckhart, 2 Howard, 344, which was also argued by counsel preëminently learned in the land law of Spain and the United States; and the organ of the Court delivering its opinion was Mr. Justice Catron, himself of recognized skill, legal instinct, judicial acuteness and soundness in these questions of public land law. In that case the Supreme Court

again revised this whole question of pueblo lands, and determined that they did constitute a statute property in a town, a statute title anterior to any patent, it being the direct act of sovereignty in the highest form of grant, above and beyond any question of technicalities of evidence in the form of a patent or what not; and the commentaries of the Court there on the argument are perfectly comprehensive and most suggestive of the true doctrine appliable to the subject.

Then again, in the State of Texas, this question could not fail to arise, and it did arise, and was decided in the case of Lewis *vs.* San Antonio, 7 Texas, 288. This precise question, in all its force and weight, with all its possible qualifications and conditions, was again discussed in that case, and was determined by the Supreme Court of that State in precisely the same sense in which this Court had determined it in New Orleans *vs.* the United States, and in Chouteau *vs.* Eckhart.

In numerous cases in the State of California, the same question has been determined, not merely in the great case of Hart *vs.* Burnett, 15 California, 616, but in the earlier cases of Cohas *vs.* Raisin, 3 California, 450; and Welsh *vs.* Sullivan, 8 California, 199.

All the possible comment which these cases admits of is,—how could it be decided otherwise? How could the Supreme Court of California do otherwise than to decide that this statute-title to pueblo land, which had been twice before your honors under the laws of the same country, Spain, was a good statute-title? How in those cases could the Supreme Court of California determine otherwise than that there was validity in the pueblo lands claim of San Francisco? Indeed, in the still later case of Payne *vs.* Treadwell, 16 Cal., 230, it has not only recognized the validity of the title, but assumed that it has definite statute limits.

So, then, may it please your honors,—apart from anything to be said presently as to the effect of the language of the decree rendered by Mr. Justice Field in the case of San Francisco *vs.* the United States, and of the language of the act of Congress confirming the pueblo lands of San Francisco,—apart from these two matters, which we reserve for separate

consideration,—we think ourselves entitled now to resume as follows:

In the year 1848, on the transfer of California to the United States by the treaty of Guadalupe Hidalgo, the town of San Francisco was in possession, as of right by statute title, of pueblo lands to the amount of four leagues. They might have been nibbled away, or they might not have been nibbled away, by acts, lawful or unlawful, on the part of individuals or governors; that is immaterial; it was in possession as of statute right and of statute title on that day of the pueblo lands. Its right had not been passed upon judicially; but it was an existing right, a statute title, and a statute title guaranteed by the treaty of Guadalupe Hidalgo.

When afterwards that statute title came to be formalized by a decree of his honor, Mr. Justice Field, by dismissal of an appeal here, and by acts of Congress, then, if my previous observations are sound, this title of San Francisco dated back to the time of the Mexican Government,—dated back to the day when San Francisco became a pueblo, according to the laws of Mexico.

We have not time to go into all the details of that fact. The Brief refers to them, and your honors will, of course, from curiosity, if not otherwise, look into the most elaborate collection of law upon this subject, Mr. Dwinelle's book, and see that the pueblo of San Francisco existed so far back, at least, as 1836. It is not important, however, to show that it existed any further back than July 7th, 1846, the date inserted in the act of Congress of March, 1851, as that of the conquest of California by the United States. We say that its title, authenticated as form of law in 1865 and 1866, dates back to 1846, and is to be deemed private property of San Francisco at that date, held in trust according to the conditions of pueblo property at the time when California was transferred to the United States.

Now, finding that these pueblo lands were, in 1846–1848, private property of the pueblo, afterwards city of San Francisco, we have to ask your honors whether they were in any other respect private property than the private property of

General Fremont in Mariposas, or the private property of Fossat in the grant of the land and mines of New Almaden.

We submit that, as against the public domain, pueblo lands were private property in the same sense that those two parcels of land were private property, and were equally entitled to the protection of the United States as private domain,—capable, it is true, of being appropriated under forms of law for public uses, but not public domain of the United States to be dealt with as public domain of the United States.

Although our brothers here will discourse of the magnitude of this question, how important it is that the United States should hold these places as against private proprietors, all that, your honors know, resolves itself into a question of money. There is nothing else in it. Shall the Government usurp this private property, and hold it without indemnification? That is the question we shall come to ultimately; and therefore it is wholly immaterial whether the Government needs it or not. We are not to be prejudiced, our rights are not to be impaired, by this consideration; we are not to have the sword of Brennus thrown into the scales of Justice here for the purpose of depriving us of our rights. In the extremest relation it is a question of money value and indemnification; nothing else.

Then, the property being, as we think it is now shown to be,—private property, not public domain,—we come briefly to ask your honors to consider whether, by any act of the United States, this property of the pueblo of San Francisco, or of its grantee, the plaintiff, has passed to the United States Let us see under what pretences it is claimed to have passed.

The first pretence is the reservation of 1850. We have shown how that reservation was made; and on looking at it, your honors will find very serious difficulties in according to it any value whatever; for the order of President Fillmore was, on its face, not intended as an actual reservation, but only as a preliminary step towards a reservation.

Second, the order gives only two boundaries, and encloses nothing.

And third, if it encloses anything, it excludes the premises in controversy.

Then, under that supposed reservation, we submit, if it had any legal force, (suspending for the moment the inquiry whether it had any legal force,) it constitutes no defence to General McDowell. It does nothing to impair the title of Grisar.

Next comes the reservation, so-called, of December, 1851; and as to that, as technicality, we submit, first, that there was no intention to extend the boundaries of the reservation, but, on the contrary, to throw out a part of it in compromise; and the intention and meaning of the order were to reserve only so much of *the original reservation* as would fall within a circuit of eight hundred yards from Point José; for it expressly purports to be a reduction. If we are to adopt the construction, on which the Government now stands, it was not a reduction, but an augmentation; and that nonsense we are not to suppose.

Again, the order was not a reservation in terms, but only a preliminary direction as to the survey, as the basis of future action.

Then arises a dilemma: If the act of 1850 was a valid reservation, it must stand until changed by act of Congress. It cannot be reversed by the Executive. (United States *vs.* Stone, 2 Wallace, 525.) But the reservation of 1850 does not include the *locus in quo;* and the reservation of 1851 is not a valid original act, being avowedly but a modification of a supposed previous reservation, and without any original or independent force or virtue of its own.

So, as to these two so-called reservations, we submit that they have not the technicalities of a reservation.

But we do not condescend to stand upon technical questions; for behind that is this most substantial question. We ask your honors to reflect,—we entreat the Court to consider well,—where it is that the President of the United States,—we are now dealing with a professed act of the President,—finds *authority to take lands?* I dwell upon the question, to ask your honors once again where the President of the United States gets power to take land? No such power is to be found in the Constitution; no such power is by that charter entrusted

to the President of the United States. The Constitution confers power upon *the law*, through its organs and agents, to take land, granting indemnity; but we repeat, the Constitution grants no such power to that official person, the President.

Further, we say, no provision of Constitution or law in these United States confers upon that official person, the President, the power to expropriate private land. We are dealing with two forms of taking; and we say that neither of them, neither the general power to dedicate public domain, by an order of his, nor that to expropriate private lands, is conferred upon the President as an official person.

Let us pause a moment here, to inquire what possible authority in the premises, if any, the President of the United States possesses.

When this Court, in the leading case of Wilcox *vs.* Jackson, (13 Peters, 498–512,) looked around in quest of the authority by which the land then in question was reserved for military purposes, it solved the problem in the following words:

"We consider this, too, as having been done by authority of law; for, amongst other provisions in the act of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several Departments in relation to the subjects which appertain to their respective duties. * * * Hence we consider the act of the War Department, in requiring this reservation to be made, as being, in legal contemplation, the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congrsss."

There is the whole case. It is not the power to expropriate, nor the power to take, nor the power to dedicate. It is an incident only of the administration of the public lands of the United States. Under that system, beginning with the ordinance of 1785 and coming down to the present day, and substituting persons according to the changed administration on the transition of this Government from a confederation to a constitutional Union, we find that the President of the United States is empowered to order the sale of surveyed

public lands, in the first place; that is to say, he is to indicate by proclamation when they are ready for sale; and, in doing this, he is to indicate what portion of such lands shall not be sold at such time and place, whether reserved from entry by statute as mineral lands, or for the use of schools, or by grant to public uses, or deemed requisite for any specific use of the Government. Such act of the President in the premises is purely ministerial.

Even to this extent the power is not granted in very definite terms, and is frequently but half granted, or, as it were, implied.

As to public lands in California, the President had no such specific authority. The survey and sale of public lands are provided for by the act of March 3, 1853, entitled "an act to provide for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes." Of this act the pertinent provision is as follows:

"That all the public lands in the State of California, whether surveyed or unsurveyed,—with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township,—and with the exception of lands appropriated under the authority of this act, or reserved by competent authority,—and *excepting also the lands claimed under any foreign grant or title*,—and the mineral lands,—shall be subject to the preëmption laws of 4th September, 1841, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided." (10 U. S. Laws, 244.)

Then we are remitted to the act of September 4, 1841, entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," which enacts as follows:

"SECTION 8. And be it further enacted, that there shall be granted to each State specified in the first section of this act five hundred thousand acres of land for purposes of internal improvement: Provided, that to each of the said States which has already received grants for said purposes, there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred acres, the selections in all of the said States to be made within their limits respectively in such manner as the Legislatures thereof shall direct, and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale *by any law of Congress* or *proclamation of the President of the United States*, which said locations may be made at any time after the lands of the United States in said States respectively shall have been surveyed according to existing laws;

and there shall be, and hereby is, granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a Territorial government, for purposes of internal improvement as aforesaid, shall make five hundred thousand acres of land, to be selected and located as aforesaid." (5 U. S. Laws, 455.)

Here, if anywhere, is the authority possessed by the President in the premises. Reservations *out of the public domain*, —reservations from sale,—were to be made "by any law of Congress or proclamation of the President of the United States."

But no law of Congress reserved the promontory of Point José; nor did any *proclamation* of the President.

The President never proclaimed for sale the lands within the corporate limits of the city of San Francisco; and the power of the President to *reserve* from sale is but incidental to his power to proclaim for sale. If a tract of land is not capable of being proclaimed for sale as public domain, it is not capable of being reserved from sale by the act of the President.

The provision of this act, authorizing reservations from sale by proclamation, and by proclamation only, is not a mere vain form of words. There was good reason for it. Congress did not intend that settlers on the public domain should be subject to be entrapped, by having the lands they might settle upon, claimed afterwards as a reservation under some private correspondence between the Secretary of War and the President, or the President and the Commissioner of Public Lands. Hence the requirement of a proclamation on the part of the President.

But there was no proclamation in this case. There was nothing but an *order* to the Commissioner of Public Lands, not in any way communicated until a year or two afterwards to the land officers in California.

We now distinctly perceive the nature of the President's power and its sole source.

And we suggest in passing that the authority of the President in the premises can derive no corroboration from any supposed authority of the Mexican Government. In certain

of the discussions on the subject of pueblo lands, while it is vaguely assumed that such lands were subject to some undefined (and as we think undefinable) power of disposition by the Mexican Government, it has also been, with equal vagueness, supposed that some such undefined power descended, of course, to the American Government. We deny the premises, and we deny the conclusion.

Reverting, then, to this statute power of the President, there seems to be no occasion to trespass upon the time of the Court by reading fifty examples and illustrations, collected in our notes, in substantiation of the general doctrine, that it is simply the power of the President to declare when certain portions of the public domain shall be put up for sale, and when not. In enacting that the President of the United States may proclaim the sale of public lands, the same statutes enact that he may reserve from sale certain portions of those lands to be thus withheld from the saleable public domain of the United States. And, as conclusion of law, we submit to your honors, (and we should like to have our learned brother, the Attorney General, enlighten us upon the point,) that there exists in this constitutional Government of law no grant of power to the President of the United States to take land either from the public domain or from private individuals, except under these powers of reservation in the public land system of the United States. (U. S. *vs.* Fitzgerald, 16 P. 407.)

Assuming as we do that such are the measure and extent of his public power, there remains the next very simple step to take. Here the President purports, in the orders of 1850 and 1851, to reserve from sale a tract of land in the State of California. He does not appropriate to any public use: he simply reserves from sale. Could the President of the United States reserve from sale anything except public domain? Is not that self-evident? Is it possible to make that clearer by argument? We say he could reserve from sale nothing but public domain, and we have already shown that these pueblo lands were not public domain. They were not public domain in the hands of Mexico at the time of the conquest; they did not become public domain in the hands of the United States.

Indeed it is difficult to understand how it came ever to be conceived in the State of California that pueblo lands had been grantable public domain of Mexico, in face of the express declaration of the colonization decrees, excluding public lands from such grant, and defining them as not colonizable, and, in effect, no longer public domain.

And the act of Congress of 1853, already cited, which is the foundation of land titles in California under the United States, contains a phrase of exception, which saves pueblo lands from sale or entry (and, of course, from executive reservation) equally with the school sections, and in the same sentence,—'*excepting, also, the lands claimed under any foreign grant or title.*'

Therefore we submit that this pretended reservation from sale was a mere nullity. The President and Secretary of War were acting *ultra vires* as fully as if our brother Johnson and ourselves should undertake to usurp places on that Bench, and pronounce judgment in this cause. The President acted, if you please, under misapprehension; the Secretary of War acted under error; tbat is immaterial; it needs only for us to show that they supposed that they were dealing with public domain when there was no public domain to be dealt with, as there was not. They had no power to reserve from sale in this case, for they had no power except such as the statute gave in regard to vendible public domain, and this land was not vendible public domain.

We will not occupy the time of the Court, nor exhaust its patience and our own strength, by enumerating one by one all the statutes pertinent to the subject. They are very numerous. We have endeavored to characterize them correctly. The sum is, that, in the fourteen volumes of the statutes of the United States, we find no statute power given to the President of the United States to act upon this subject matter, except in those statutes which provide for the sale of the public domain of the United States; and as this land was not public domain, we are forced to the logical conclusion that these two acts of pretended reservation were mere nullities, and are not to affect the rights of this plaintiff or to give any right to the Government.

We have partly anticipated, in answer to the suggestions of the Court, one point which it had been intended to discuss now and here, and that is the exhibition of the fact that the King of Spain possessed only this authority, no other, which the President of the United States possesses. The King of Spain could not expropriate private property, except through forms of law for compensation. The King of Spain could reserve from the public domain, we admit. And the King of Spain could enact a law of general servitude, as when it was decreed by the *Ordenanzas de Mineria*, and previous legislation in the Recopilacion, that any individual might denounce a mine on private property. We concede that the King of Spain could by general law, by augmentation of the scope of the power of eminent domain, diminish the private useful dominion of land. But, we repeat, as to reserving from sale or expropriating, his powers were those which the President of the United States possesses, that is, to apply by reservation public domain to any uses which the public good may dictate, and to expropriate private property in forms of law involving indemnification to the party aggrieved.

We now pass over that, to touch briefly upon the two questions reserved in passing along. The first of these is the force and effect of the act of Congress of 1866 on the subject of the lands of San Francisco. There are two or three considerations which it seems to me material to call the attention of the Court to in this relation. The words of the act are these:

"That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the northern district of California, entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby, relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land, not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses; *Provided, however*, That the relinquishment

and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exists, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof." (14 U. S. Laws, 4.)

We remark as to this, in the first place, that the confirmation is on the express trust to protect the property of lot holders. Our client is a lot holder; he comes within the express statute trust of that act.

Moreover, this act confirms to San Francisco with a saving of any rights, whether derived from Spain, Mexico, or the United States, that they may be judicially examined. Upon that it is to be observed that a title, if it be a title, professing to be a reservation out of the vendible public lands, can in no sense be deemed a title derived from the United States. The United States, we submit, does not by a reservation derive title. That may be a nice criticism; but we submit it is true, that when the United States reserve a section of a township for the purpose of putting a school upon it, or a hospital, the United States do not *derive* title from that act of reservation: the Government only dedicates what it has. It assumes that it has a title and dedicates. So this proviso, we submit, does in no sort aid defendant. He does not set up title. It is the United States which set up title. But there is no reservation in this act in behalf of the United States.

There are many things here, which we think there is reason to fear your honors will hear of by and by; for we suppose the owners of swamp lands in California will, under this act, set up title derived from the United States. We do not know but that some preëmptor may; it would not surprise if the holders of school land warrants should; and intimations are afloat in the air, that various persons who, as your honors thought, were extinguished by decisions of this Court, will be heard of again. We do not know but that Santillan and all the rest may turn up here. We should not wonder. At any rate, it is enough for us to say, that, whilst Congress was thus confirming the titles of everybody who claimed under Spain, Mexico, or the United States, it did not confirm

the trespass, as we regard it, perpetrated here by General McDowell.

We deem it superfluous to comment, at length, on the provisions of the act of July 1, 1864, (13 U. S. Laws 332,) which only except from relinquishment sites in *possession* of the Government on the day of its enactment, as this land was not,—or land duly reserved within a prescribed time, as this was not;—and which provisions were superseded by those of the act of March 8, 1866, as we conceive.

The decree of Mr. Justice Field, in the case of the city of San Francisco *vs.* the United States, confirms to the city a certain area of four square leagues, subject to certain deductions, one of whieh is "such parcels of land as have been heretofore reserved or dedicated to public uses by the United States. Could any part of the pueblo lands be so reserved or dedicated under Spain or Mexico? We have already argued that they could not. But if so, by whom? Not by the Governor, for that the colonization laws forbid. But, if there was such power, did it descend to the United States. And, if so, by whom was it to be exercised? By the President? Surely not. We have shown the whole extent of his power. On this point let me quote from Opinions of Attorneys General, vol. 8, p. 335, as follows:

"Land previously expropriated by Spain or Mexico, and occupied for public uses at the time of the change of sovereignty, would pass to us in the same condition. But, after that time, expropriation could be made only in the forms of our own laws, public or municipal, which determine the relative right of the Government and the proprietors of land within either of the States, without material aid in this respect being desrivable from the land laws of Spain or Mexico."

Will it be suggested that the Spanish or Mexican Government, as a Government, might dispose *arbitrarily* of pueblo lands, and that the power descended to the American Government as a Government? Surely not.

In addition to what has already been said on that point, let me further say, that this idea will not help defendant in the present case, because no Government, as a Government, in the aggregate of its legislative or executive powers, had acted in the matter.

First, if the United States, as a Government, could do this, it has not done it. It might have done it, by its sovereign power, before California became a State; because, until then, the eminent domain was in the United States. But it did not act then; and it has not acted since. We have but an order of the President *after* California came into the Union. No act of Congress can be cited to declare pueblo lands public domain, and saleable or reservable as such. No act of Congress exists to regulate the expropriation of public lands within a State of the Union.

Secondly, no act of the Congress of the Mexican Republic has been produced, or can be produced, by which pueblo lands are treated as grantable public domain, or made saleable for other uses at the mere discretion of the Mexican Executive. No such act of the Congress of the Mexican Republic has been or can be produced.

Of any acts of this nature, the only one heretofore cited is the decree of the Spanish Cortes of 1813; but that we have already disposed of in the course of this argument, with help of the decision. In the case of the United States *vs.* Vallejo, (1 Black, 553,) which clears from our pathway that decree of the Cortes.

One thing more in this relation. In the case of DeHaro *vs.* the United States, the Attorney General and myself argued in conjunction that pueblo lands were not grantable by the Mexican Government. On those premises it is impossible that pueblo lands should be public domain of the United States subject to reservation by order of the President.

As to confirmation, by this Court, of grants out of pueblo lands, that point also was dealt with in the same cause. I quote from my argument on that occasion, as follows:

"Shall we be told that this Court has confirmed grants within the pueblo lands of San Francisco? Yes, but as we have already remarked in another relation, the question was not raised. If it had been, the decisions might have been otherwise. The only cases which occur to me are the land claims of Bernal and of Noe, which do cut into the pueblo lands. Indeed, that of Noe was but for a garden. And the land in the city confirmed to Leese and Vallejo was rather in the nature of a *solar* than a colonization concession, being only for the site of a warehouse.

"So that in fact little remains of adverse precedent, but the case of Bernal. And your honors, in the case of New Orleans *vs.* the United States, overstepped greater obstacles than that in order to maintain the original right and the present integrity of the common lands of New Orleans."

Now, may it please the Court, having occupied as long as is in any degree seemly the attention of your honors, it behooves me to dispose, in the briefest possible words, of all which remains, as it appears to me, of this cause, and that is the acts of the War Department of 1863–4–5, which become material, because actual possession here as against our client was taken under these acts, and not in virtue of the previous pretended reservations by the President. No possession was taken by the United States under those reservations: they remained a mere dead letter. It was not until 1865 that any practical question arose upon this subject.

From the year 1850 to that of 1863 the city of San Francisco and its inhabitants continued to act with this property in the assumption that it was pueblo lands, grantable as such by the city alone. Mrs. Fremont became tenant of an estate; Mr. Grisar also; a woolen-mill was constructed upon the property; so were the city water-works. During all this period there was no cause to suspect that there remained, hidden away in the pigeon holes and desk of some officer of the United States, a dormant claim of reserve under date of 1851, to be brought up some day of a sudden to dispossess the city and its tenants. And, therefore, we have now, it would seem, as the only true question before the Court upon the present taking, upon the *ouster*, upon the actual dispossession, to deal with the following paper:

"WASHINGTON, D. C., *October* 2, 1863.

"To Brig. Gen'l S. WRIGHT:

"The Secretary of War directs that you take military possession of Point San José, and erect the battery proposed for its defence: the question of ownership will be determined hereafter.

"H. W. HALLECK,
Gen'l in Chief."

We submit to your honors that there is in this document no expropriation or pretence of expropriation whatever, but the

contrary. There is no assertion of ownership in the United States, but the contrary. It is not a military reservation which is provided for, or any other reservation under the land laws and land system of the United States. What is done is to 'take military possession' of the Point San José, as, during that same year, under correspondent orders of the War Department, it may be that a thousand parcels of private property were taken possession of for temporary war purposes. Does anybody pretend, was it ever suggested, that these military takings during the war were *transfers of title?* I cannot imagine that so it is to be asserted. I assume that all these military takings are temporary possessions of necessity, and no more,—the necessity of war;—and that, if the Government desires to convert them into property, it must pursue the forms of law. It must, in the first place, purchase with the assent of the State of California. In the second place, it must obtain from the State of California a cession of jurisdiction. In the third place, it must have that title verified by the Attorney General, according to law. When it has done these things, then it may set up title, which title would have been acquired in the forms of expropriation, or in the forms of purchase, required for the protection of every citizen of the United States under its laws and its Constitution.

If the pretence here be change of property by expropriation, where is the evidence of such expropriation?

The War Department does not profess to change property, but expressly leaves that question to be determined. Nor does the War Department propose to take, as on a previous lawful reservation by the President. If that had been the thought, it would have appeared in the order. There would have been no occasion to recognize unsettled claims of private property.

But the defendant here sets up property in the United States. The issue is of the question of property. The finding is of property.

On this issue and this finding, the defendant stands wedged between the two sides of the dilemma, namely: Was the

land, at the time of his entry, in 1864–5, public domain of the United States? The order, in virtue of which the defendant entered, does not so pretend or claim. And if it had done so, still, as we conceive, such pretence or claim would have been destitute of any valid foundation in right, whether under the laws of the United States or of the Mexican Republic.

And thus, the defendant is forced to rely on the argument of expropriation.

Whether the War Department has or not been acting under the delusion, within the last few years, that whenever a quartermaster or ordnance officer, for good cause or bad, under whatever serious or futile pretext of public necessity, touches a piece of land, such land thereby becomes the property of the United States,—we do not know. Certain it is, that there has been much taking, and much retention, under orders of the War Department, which in other times and circumstances would have been deemed acts of intolerable wrong.

If, in this case, it could possibly be imagined that seizure by the War Department transfers title, it would be well to remember the numerous adjudications of the Courts, requiring that indemnification should go along with seizure, as the condition *sine que non* of any change of property. The question is learnedly and ably discussed by Mr. Justice Wilmot, of the Court of Claims, in Grant's case, 1 Nott & Huntington, p. 41. That opinion is notable for the high sense of justice which pervades it, and its conclusions are entitled to the greater authority, inasmuch as they were accepted and acted on by the Government.

Without discussing the question ourselves, we refer to the ample collection of authorities contained in the notes of Kent's Commentaries, vol. 2., p.* 339, as follows:

"The right of eminent domain, or inherent sovereign power, gives to the Legislature the control of private property for public uses, and for public uses only. * * In these and other instances which might be enumerated, the interest of the public is deemed paramount to that of any private individual; and yet, even

here, the Constitution of the United States, and of most of the States of the Union, have imposed a great and valuable check upon the exercise of legislative power, by declaring that private property should not be taken for public use without just compensation. A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle, in American constitutional jurisprudence, is founded in national equity, and is laid down by jurists as an acknowledged principle of universal law. * * Grotius, De Jure B. & P. b. 3, ch. 19, sec. 7—ch. 20. sec. 7. Puff. De Jure Nat. et Gent. b. 8, ch. 5, sec. 3, 7. Bynk. Quest. Jur. Pub. b. 2, ch. 15. Vattel, b. 1, ch. 20, sec. 244. Heinec. Elem. Jur. et Nat., b. 2, ch. 8, sec. 170.

"The better opinion is that the compensation, or the offer of it, must precede or be concurrent with the seizure and entry upon private property under the authority of the State. The Government is bound, in such cases, to provide some tribunal for the assessment of the compensation or indemnity, before which each party may meet and discuss their claims on equal terms; and if the Government proceed without taking these steps, their officers and agents may, and ought to be, restrained by injunction. The process of injunction was granted by the Court of Chancery, in Gardner *vs.* Village of Newburgh, and it was also sustained by the Supreme Court of Louisiana, in a like case; 2 Johns. ch. Rep. 162. Henderson *vs.* Mayor, &c., of New Orleans, 5 Miller's Loius. Rep. 416. The Civil Code of Louisiana, art. 489, had declared that there must be the *previous* indemnity, and so did the *Code Napoleon*, art. 545, and the constitutional charter of Louis XVIII. The provision in our American constitutions is essentially the same, though not in the same words precisely, and it would seem to require the same construction. Several of them declare that private property shall not be taken for public uses *without full compensation being made.* The settled and fundamental doctrine is, that Government has *no right* to take private property for public purposes, without giving a *just compensation;* and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time, with the actual exercise of the right of eminent domain. This point was ably discussed in Thompson *vs.* Grand Gulf R. R. and Banking Company, 3 Howard 240, and the decision was that the compensation must precede the seizure of private property for public uses. This was also the opinion of Chancellor Walworth, of New York, in Lyon *vs.* Jerome, 26 Wendell, 497. But it is not to be understood that a statute assuming private property for public purposes, without compensation, is absolutely void, so as to render all persons acting in execution of it trespassers. Some of the judicial *dicta* seem to go that length, but others do not. 12 Serg. & Rawle, 366, 372. 20 Johns. Rep. 745. In Core *vs.* Thompson, 6 Wendell, 634, it was held that neither the payment nor the assessment need precede the opening of a road over the land of an individual. The compensation may have been provided for without constituting part and parcel of the act itself, and I think the more reasonable and practicable construction to be, that the statute would be *prima facie*, good and binding and sufficient to justfy acts done under it, until a party was restrained by judicial process, founded on the paramount authority of the Constitution.

"In Bonaparte *vs.* C. & A. Railroad Company, 1 Baldwin's C. C. U. S., Rep. 205, it was held that a law taking private property for public use, without providing for compensation, was not void, for it may be done by a subsequent law.

But the execution of the law will be enjoined, until the provision be made, and the payment ought to be made simultaneous with the actual appropriation of the property. It is admitted that even a statute franchise, as a toll bridge, or a road, must yield to the right of eminent domain, and may be impaired or taken away and appropriated to public uses whenever the public exigencies require it, for a franchise is fixed and determined property; but it must be on the condition of making just compensation to the proprietors. * *

"Gardner *vs.* village of Newburg, 2 Johnson's Ch. Rep. 139, Story, J., in Charles River Bridge *vs.* Warren Bridge, 11 Peter's Rep., 638, 641. * *

"In ancient Rome, such respect was paid to the rights of private property, that a scheme of the censors, B. C. 179, to supply the city with water by means of an aqueduct, was defeated by the refusal of a proprietor to let it be carried through his lands; and at a subsequent period, the Senate decreed that it should be lawful to take from the adjoining lands of individuals the materials requisite for the repairs of aqueducts, upon an *estimate of the value or damages to be made by good men*, and doing at the same time the least possible injury to the owners. When a private house was injured by a public road or aqueduct, the Emperor Tiberius paid the damage on petition by the party to the Senate. Tacit. Ann. b, 1 sec. 75. So, in London, by an act of Parliament as early as 1544, the corporation of the city was invested with the power to enter upon and appropriate private property requisite for the purpose of supplying the city with water; but the ground needed was to be appraised by three or four different persons appointed by the Lord Chancellor, and to be paid for within one month after possession taken. See *King's Memoir on the Croton Aqueduct* with a learned and very interesting preliminary essay, pp. 25, 27, 51.

"The exercise of the legislative power of eminent domain was learnedly discussed in the case of Bloodgood *vs.* M. & H. Railroad Company, 14 Wendell, 51 S. C. 18; Ib. 1, 59; and it was held, by the Court in the last resort, on error, that the legislature might authorize railroad companies to enter upon and appropriate private property in land for the use of the road, so far as it became indispensably necessary for the purpose of the road; *provided*, provision be made in the act for the assessment and payment to the owner of the damages incurred. If the provision was made, it was held to be sufficient, and that the damages need not be actually ascertained and paid previous to the entry and appropriation of the property. See also Fletcher *vs.* the Auburn & Sy. Railroad, 25 Wendell 462, 464. This is the construction given to English statutes in like cases, and frequently, as Lord Denman observed, the amount of compensation cannot be ascertained until the work is done. Lister *vs.* Lobley, 7 Adol. & Ellis 124. But in Dor *vs.* Georgia R. R. & B. Company, 1 Kelly 524, it was held that the *title* to the property assumed for the road did not pass from the original owner until the prescribed compensation was actually made. And in some of the railway acts in England the company is prohibited from entering on the land, without consent, until the ascertained compensation is paid or tendered. So in Mississippi, the damages for land taken for a railroad must first be paid before the right to the use of it becomes vested. Stewart *vs.* Railroad Company, 7 Smede & M. 568. It rests with the legislature to judge of the cases which require the operation of the right of eminent domain, and it may be applied to the case of roads, turnpikes, railways, canals, ferries, bridges, &c., provided there be, in the assumption of the property,

evident utility and reasonable accommodation as respects the public. Cotrill *vs.* Myrick, 3 Fairfield 222; Dyer *vs.* The Tuscaloosa Bridge Company, 2 Porter's Rep. 296; Harding *vs.* Goodlett, 3 Yerger 41; Chancellor Walworth, in 18 Wendell 14, 15."

See also Graham vs. U. States, 2 Nott & Huntington 327.

Johnson vs. U. States, Ibid. 391.

In short, all which this taking of the War Department may amount to, if it amounts to anything, is just such temporary possession as has been applied by officers of the army to any tract of land needed or supposed to be needed for transient military uses, any point on the coast, any dwelling house, any public edifice in the city of Washington; churches, museums, private houses, all have been taken under just such orders as this; but we are now to learn, if it is a thing possible to learn, that such an order is to constitute a transfer of property, and gives title to the Government against any individual citizen of the United States.

To conclude: The pretended reservations by the President were a nullity; because no land, within the limits of the city of San Francisco, was or could be grantable or reservable public domain. It was trust property of the city. As trust property, it was subject to the control of the Mexican Government, as *parens patriæ*, enforcing or regulating the administration of such trust by the city. On the admission of California into the Union, the jurisdiction of this trust became vested in the State, not in the United States. (Hart *vs.* Burnett, 15 California R., 616.) And, at the same time, the right of eminent domain, as to this private property in California, became vested in the State. (Pollard *vs.* Hogan, 3 Howard, 212.)